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NO.

In the Supreme Court of the United States

OCTOBER TERM, 1983

NO. A-360

C'EST LA PLACE,

Appellant,

VS.

GRONER APARTMENTS,

Appellee.

On Appeal From The Denial of Writ of Certiorari by the Louisiana Supreme Court

JURISDICTIONAL STATEMENT STATE CIVIL CASE

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QUESTION PRESENTED

Whether appellant's constitutional due process rights were violated by the Louisiana courts' application of Louisiana Civil Code articles 2561 and 2562 in such a way as to divest appellant's title to real estate without prior notice or an opportunity to defend its property rights.

LIST OF INTERESTED PARTIES

The following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

Groner Apartments
David Groner
Kathryn Nelson Groner
Marilyn Groner
C'est La Place
Alexander Magnus
Bayou Teche, Ltd.
New Iberia Apartments

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JURISDICTIONAL STATEMENT
STATE CIVIL CASE

C'est La Place, the appellant, appeals from the judgment of the Louisiana Third Circuit Court of Appeal, which was made final and definitive by the Louisiana Supreme Court's denial of C'est La Place's Petition for Certiorari or Review.

OPINIONS BELOW

The opinion of the Sixteenth Judicial Court, Parish

of Iberia, State of Louisiana, in the case entitled "Groner Apartments v. Controlled Building Systems, Inc., et al.", Civil Action No. 48246, dated January 22, 1982, is not reported, but is reprinted in the appendix hereto, pp. A-12, 13, *infra*.

The opinion of the Sixteenth Judicial District Court, Parish of Iberia, State of Louisiana, in the case entitled "Groner Apartments v. Controlled Building Systems, Inc., et al.", Civil Action No. 48246, dated September 25, 1982, is not reported, but is reprinted in the appendix hereto, pp. A-14-18, *infra*.

The opinion of the Third Circuit Court of Appeal, in the case entitled "Groner Apartments v. Controlled Building Systems and C'est La Place", Civil Action No. 83-30, dated May 25, 1983, which appears in the appendix hereto, pp. A-1-11, *infra*, is reported at 432 So.2d 1142 (La. App. 3d Cir. 1983).

The denial of C'est La Place's Petition for Certiorari or Review dated October 7, 1983, in the case entitled "C'est La Place, Petitioner, vs. Groner Apartments, Respondent", is not reported but is reprinted in the appendix hereto, pp. A-28-29, *infra*.

SUPREME COURT'S JURISDICTION

This is a Louisiana state court action based on Articles 2561 and 2562 of the Louisiana Civil Code. These articles give a seller of real property the right to rescind a credit sale if the buyer fails to pay the credit portion of the purchase price when due. Appellee, Groner Apartments, sued Controlled Building Systems, Inc. (CBS) and C'est La Place, appellant, to rescind appellee's sale of real property

to CBS and to dissolve all subsequent sales of the property, including the ultimate sale to C'est La Place.

Groner Apartments sold the property to CBS on October 25, 1979 in a credit sale. CBS sold the property to Alexander Magnus, who in turn resold it to C'est La Place on December 12, 1980. C'est La Place was the record owner of the property when Groner Apartments filed this suit.

Without any prior notice to C'est La Place, the trial court rendered a default judgment on October 1, 1981 against CBS, C'est La Place's co-defendant and predecessor in title to the property. This default judgment dissolved Groner's sale of the property to CBS. See appendix hereto, pp. A-19, 20, *infra*. C'est La Place moved to have this default judgment annulled in the trial court but the motion was denied by judgment entered on February 5, 1982. *See* appendix hereto, pp. A-21, 22, *infra*.

On appeal, the Louisiana Third Circuit Court of Appeal held that the default judgment against CBS divested C'est La Place of title to the property, even though C'est La Place received no notice of the default proceedings. The Third Circuit interpreted Articles 2561 *et seq.* to provide that C'est La Place could lose its property rights without prior notice of the default proceedings and without any opportunity to defend its title. The Louisiana Supreme Court denied C'est La Place's Petition for Certiorari or Review on October 7, 1983.

C'est La Place requests this Court to review the decision of the Third Circuit Court of Appeal dated and entered on May 25, 1983 and the judgments of the trial court entered on February 5, 1982 and October 18, 1982, which were made final and definitive by the Louisiana Supreme

Court's denial of the Petition for Certiorari or Review on October 7, 1983. On November 2, 1983 C'est La Place filed a Notice of this Appeal in the Louisiana Supreme Court, the Third Circuit Court of Appeal and the Sixteenth Judicial District Court for the Parish of Iberia, Louisiana, and sent copies of the Notice of Appeal to these courts and to opposing counsel. *See* appendix hereto, pp. A-30- 35, *infra.*

Jurisdiction of this appeal is conferred on this Court by 28 U.S.C. §1257(2). An appeal to this Court lies where the constitutionality of a state statute is drawn into question and the highest court of the state renders a final judgment in favor of its validity. C'est La Place has satisfied all of the requisites for this Court's appellate jurisdiction over this case. First, C'est La Place challenged the validity of the entry of the default judgment on constitutional due process grounds in the trial court and in the Court of Appeal. *See* appendix hereto, pp. A-48-56, *infra.* After the Third Circuit Court of Appeal intrepreted Louisiana Civil Code articles 2561 *et seq.* to mean that a record owner of real property has no right to prior notice of a proceeding in which its property rights are divested, C'est La Place again challenged the application of these codal provisions on due process grounds in its Petition for Certiorari or Review to the Louisiana Supreme Court. Thus, the highest state court was apprised that certain state statutes as applied to this case were being assailed on federal constitutional grounds, thereby satisfying the first prerequisite to this Court's jurisdiction. *Charleston Federal Savings & Loan Ass'n v. Alderson,* 325 U.S. 182, 185 (1945). *See* appendix hereto, pp. A-57-70, *infra.*

Second, C'est La Place attempted to invoke the jurisdiction of the Louisiana Supreme Court, Louisiana's highest state court, but the supreme court declined to

review the judgment of the Court of Appeal, which made the judgment of the Court of Appeal final and definitive. La. Code Civ. Pro. art. 2166. This satisfies the second jurisdictional prerequisite, a final decision from the highest court of the state. *See, e.g., Abood v. Detroit Board of Education,* 431 U.S. 209 (1977); *American Motorists Ins. Co. v. Starnes,* 425 U.S. 637 (1976); *McCarthy v. Philadelphia Civil Service Comm'n,* 424 U.S. 645 (1976); *Interstate Circuit, Inc. v. City of Dallas,* 390 U.S. 676 (1968); *Harrison v. Missouri Pacific R.R. Co.,* 372 U.S. 248 (1963); *American Ry. Express Co. v. Levee,* 263 U.S. 19 (1923) (on review from a denial of petition for certiorari by the Louisiana Supreme Court).

C'est La Place has also satisfied the third prerequisite: that the state court find in favor of validity of the statutes. Even though the Court of Appeal and the Supreme Court did not specifically address C'est La Place's constitutional challenge, these courts' failure to pass on the constitutional objections to the state statute is equivalent to a finding of validity within the meaning of 28 U.S.C. §1257(2). *Lawrence v. State Tax Comm'n,* 286 U.S. 276, 282-83 (1923).

The Court of Appeal specifically held that Articles 2561 *et seq.* of the Louisiana Civil Code applied to this case and that the application of these articles resulted in divestiture of C'est La Place's title. This Court has repeatedly held that the validity of a state statute is sustained for the purposes of appellate jurisdiction when a state court holds it applicable to a particular set of facts against the contention that such application is invalid on federal grounds. *See, e.g., Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434 (1979).[1]

[1] Should this Court decline appellate jurisdiction in this case, 28 U.S.C. §2103 provides that this jurisdictional statement shall be

CONSTITUTIONAL PROVISIONS AND STATE STATUTES

Fifth Amendment, United States Constitution, *see* appendix hereto, p. A-76, *infra.*

Fourteenth Amendment, United States Constitution:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (*See* appendix hereto, p. A-76, *infra* for remaining sections.)

Article 2561 of the Louisiana Civil Code:

> "If the buyer does not pay the price the seller may sue for the dissolution of the sale. This right of dissolution shall be an accessory of the credit representing the price, and if it be held by more than one person all must join in the demand for dissolution; but if any refuse, the others by paying the amount due the parties who refuse shall become subrogated to their rights."

Article 2562 of the Louisiana Civil Code:

> "The dissolution of the sale of immovables is

(Footnote 1 continued)
regarded and acted on as a petition for writ of certiorari and as if duly presented to this Court at the time the appeal was taken. This Court has jurisdiction to review this case by writ of certiorari under 28 U.S.C. §1257(3).

summarily awarded, when there is danger that the seller may lose the price and the thing itself.

"If that danger does not exist, the judge may grant to the buyer a longer or shorter time, according to circumstances, provided such term exceed not six months.

"This term being expired without the buyer's yet having paid, the judge shall cancel the sale."

STATEMENT OF CASE

1. In October, 1978, the Groners obtained a $1,400,000 loan from the Farmers Home Administration ("FMHA") to construct Groner Apartments. The first payment was due at the end of October, 1979. The Groners formed a partnership called "Groner Apartments" (Groner) and transferred title to the property to the partnership.

2. On October 25, 1979, Groner sold the property to CBS. The act of credit sale was recorded in the conveyance records of New Iberia Parish shortly thereafter. The consideration recited in the act of sale was $46,000 cash and two promissory notes (the "Notes") in the amounts of $145,000 and $40,000, respectively. *See* appendix hereto, pp. A-43-47, *infra*. Groner expressly waived its statutory vendor's lien and privilege.

The Notes were not due until certain remedial tasks on the project were completed and all liens were cancelled. In particular, the exigibility of both Notes was conditioned on the replacement of defective exterior siding at Groner's expense. While the maker of the Notes had the right to use note payments to pay for the remedial work, it was under no obligation to do so.

It is undisputed that the siding was not satisfactorily replaced as of the time of trial. Finally, a $41,000 lien and privilege had been recorded against the property and had not been cancelled as of the time of trial.

3. On October 29, 1979, CBS and Alexander Magnus ("Magnus") entered into a buy-sell agreement. On November 2, 1979, by addendum to the buy-sell agreement CBS assigned to Magnus all CBS' rights, including the right to enforce Groner's performance of the remedial work as a condition precedent to exigibility of the Notes.

4. On November 9, 1979, CBS, having owned the property only 15 days, sold it to Magnus. Magnus assumed the FMHA loan, paid $276,000 cash and gave CBS a $200,000 promissory note. The president of CBS committed suicide approximately one month after the sale and the corporation ceased doing business shortly thereafter.

5. In April 1980 David Groner, Magnus, the architect, a representative of FMHA, and the contractor met at the apartment complex to discuss remedying the defective siding and other problems.

6. On December 12, 1980, Magnus sold the Groner Apartments to C'est La Place. Magnus continued to participate in managing the property as the representative of the managing partner of C'est La Place.

7. On June 22, 1981 (more than one and one-half years after CBS sold the property), Groner sent a registered letter (to CBS only) "demanding" that CBS deduct the cost of repairing the exterior siding from the amounts otherwise due on the Notes and pay Groner the difference, despite the fact that the Notes gave Groner no right to

make such a "demand." Moreover, although Groner knew that Thomas Causey, President of CBS, had committed suicide at least a year and a half earlier and that the corporation had ceased doing business, Groner did not make a similar "demand" on Magnus or C'est La Place.

8. On July 27, 1981, Groner sent a second registered letter, only to *CBS*. Groner again "demanded" payment of the Notes and "demanded" that CBS deduct the amount necessary to repair the exterior siding (for the amount of a bid Groner had obtained) and that CBS pay the remainder of the amount due on the Notes at that time to Groner. Both these registered letters to the Causeys were returned "moved, left no forwarding address." Groner made no similar "demand" on Magnus or C'est La Place.

Well before Groner made its "demands" on CBS, Groner knew that Magnus and, later, C'est La Place had purchased the project and were the proper parties to whom to address any such "demands". During the time Magnus and C'est La Place owned the property, Groner had business dealings with them concerning the property. For example, Groner executed certain FMHA forms to allow Magnus to assume the FMHA loan on the property, discussed selling Magnus additional land in front of the project, and executed certain documents with FMHA to designate a company owned by Magnus as project manager.

All of these dealings occurred before Groner sent the "demand letters" to the defunct corporation; yet Groner did not send copies of the letters to C'est La Place, Magnus, or the project manager even though Groner was fully aware of their interest in the property. If Groner had

wanted to send the "demand" to the owner of the property, Groner could easily have done so. Instead, C'est La Place did not even learn that the "demand" letters had been sent until well after the default judgment was entered on August 26, 1981, less than a month after Groner sent the second registered letter to CBS, Groner filed suit against CBS and C'est La Place, the record owner at the time.

9. On September 15, 1981, Groner's counsel agreed to give C'est La Place's counsel an additional thirty days to answer Groner's petition. *See* appendix hereto, pp. A-69-70, *infra*. During that thirty-day period, Groner obtained a preliminary default against CBS and confirmed the default even though Groner did not prove that the conditions precedent to exigibility of the Notes had been satisfied. C'est La Place had no knowledge of this proceeding nor was any prior notice of the preliminary default or of the default confirmation proceeding mailed or delivered to C'est La Place or Magnus. The judgment of default ordered a rescission of the sale between Groner and CBS.

10. On October 2, 1981, C'est La Place filed its answer without knowledge of the default proceedings. On October 6, 1981, having learned of the default judgment, C'est La Place filed a Motion for Annulment of Judgment on the grounds that it was an indispensable party to the default proceedings and that to dissolve the sale without *notice* to C'est La Place was tantamount to taking its property without due process of law. On February 4, 1982, the trial court ultimately denied C'est La Place's Motion for Annulment of Judgment but held in its reasons for judgment dated January 22, 1982 that the default judgment would not prejudice any rights C'est La Place had to assert its defenses and that the default was not conclusive as to

C'est La Place. After the trial, the lower court rendered judgment on October 18, 1982 against C'est La Place, even though the court expressly found that the siding had not been repaired. On February 7, 1983, C'est La Place appealed from that judgment and the denial of its motion to annul the default proceedings, again raising the constitutional arguments.

11. The Third Circuit Court of Appeal disagreed with the trial court's disposition of C'est La Place's motion for annulment of the default judgment, and held instead, that the default judgment *was* conclusive as to C'est La Place and deprived it of its rights to the property even without prior notice. The Court of Appeal held that Louisiana Civil Code article 2561 not only permitted rescission of the sale by Groner to CBS but also had the *simultaneous* effect of freeing the property from all *subsequent conveyances*. The court went on to state that "subsequent purchasers [such as C'est La Place] need not be made parties to an action for dissolution [based upon Louisiana Civil Code article 2561] to be valid." 432 So. 2d at 1146. The recordation of a credit sale was sufficient notice, according to the court, to put subsequent purchasers on notice "that some day the plaintiff may exercise his right to dissolve the sale for nonpayment of the purchase price." *Id.*

12. On June 23, 1983, C'est La Place filed a petition for certiorari or review in the Louisiana Supreme Court. In its petition C'est La Place challenged the constitutionality of the Court of Appeal's application of Louisiana Civil Code articles 2561 *et seq.* *See* appendix, pp. A-57-70, *infra*. On October 7, 1983, the Louisiana Supreme Court denied C'est La Place's Petition for Certiorari or Review. This appeal followed.

SUBSTANTIALITY OF THE QUESTION PRESENTED

This case presents the important constitutional question whether a state statute can be applied to deprive a person of his property rights without affording that party due process of law. The Fourteenth Amendment to the United States Constitution establishes each citizen's right to due process of law prior to the taking of his property. By holding that C'est La Place was not entitled to notice of a proceeding which took away its title to real property, the Louisiana Court of Appeal in this case disregards this constitutional mandate and the many pronouncements of this Court.

The state court decision threatens the sanctity of property ownership and jeopardizes the marketability of real property in Louisiana. *See* amicus curiae brief filed by Lawyers Title Insurance Corporation, appendix pp. A-71-75, *infra*. Because of the intrinsic seriousness of the questions presented and the state court's total disregard of the recent pronouncements of this Court, C'est La Place respectfully submits that this appeal merits full briefing and plenary consideration by this Court.

The Court of Appeal decision directly conflicts with the prior holdings of this Court. As this Court noted in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950), the due process clause at a minimum requires that deprivation of property by adjudication "be preceded by notice and opportunity for hearing appropriate to the nature of the case." The Court also stated that "[t]he right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."

339 U.S. at 314. It is undisputed that C'est La Place received no notice and had no opportunity to defend its property rights prior to the entry of the default judgment.

The Louisiana Court of Appeal decision in the instant case also directly conflicts with the most recent pronouncement of this Court on the due process notice requirement. In *Mennonite Board of Missions v. Adams*, 77 L.Ed.2d 180, 188 (1983), this Court held:

> "Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interest of any party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable."

In *Mennonite*, this Court dealt with the type of notice which due process required to be given to a mortgagee before the sale of the mortgaged property for delinquent taxes. The Indiana statute at issue provided for actual notice to the mortgagor-owner by certified mail but required notice to the mortgagee only by publication in the newspaper three times and by posting notice in the county courthouse. This Court held that this type of notice to the mortgagee was insufficient and did not satisfy the minimum constitutional precondition to a proceeding affecting its property interest.

Although the holding in *Mullane* required actual notice only if the name and address of the affected party appeared in the public record, (*see also, Walker v. City of Hutchinson*, 352 U.S. 112 (1956) and *Schroeder v. City of New York*, 371 U.S. 208 (1962)), this Court in *Mennonite*

extended the notice requirement and concluded that actual notice was required if the party's name and address were reasonably identifiable. Even though the only identification of the mortgagee in *Mennonite* was "Mennonite Board of Missions, a corporation, of Wayne County, in the State of Ohio," this Court concluded that due process required the county to use reasonable diligence to ascertain the mortgagee's whereabouts in order to give it actual notice of the tax sale.

The name and address of the record owner of any real property in Louisiana are available in the Conveyance Records: La. R.S. 35:12 (1950). Moreover, in the instant case, it is clear that Groner and its counsel knew the whereabouts of C'est La Place when the default judgment was rendered against CBS. On September 15, 1981, *fifteen* days before the default judgment was rendered, Groner's attorney granted C'est La Place a *thirty* day extension of time to answer the petition. *See* appendix pp. A-69, 70, *infra*. Thus, C'est La Place mistakenly thought it had taken the steps necessary to preserve its right to defend its title to the property. Before C'est La Place's answer was due, Groner, without informing C'est La Place, obtained a preliminary default and confirmed that default. The Court of Appeal was aware that Groner knew the whereabouts of C'est La Place and that Groner could have given C'est La Place actual notice. In his brief to the Court of Appeal, Groner's counsel admitted that he contacted C'est La Place's counsel on the same day that the default proceeding occurred, but after the judgment was rendered. Given these facts and applying this Court's decisions, the Third Circuit's interpretation of Louisiana Civil Code article 2561 so as to obviate the need for actual notice is clearly unconstitutional.

The Court of Appeal in its decision relies on the

fact that notice in the public records of a credit sale was sufficient notice to C'est La Place that "some day the plaintiff might exercise his right to dissolve the sale." *Groner Apartments v. Controlled Building Systems, Inc.*, 432 So.2d at 1146. The holding of this Court in *Mennonite* demonstrates that this type of constructive notice does not satisfy due process. The *Mennonite* court stated that the mortgagee's knowledge of the delinquency in the payment of taxes was *not* equivalent to notice that a tax sale is pending. Similarly, in the instant case notice of a credit sale in the chain of title is *not* equivalent to notice that the unpaid portion of the price has ostensibly come due or that dissolution of all subsequent conveyances and encumbrances is imminent. Examination of the recorded act of sale by Groner to CBS would have revealed only that the sale was a credit sale. It would not have revealed whether the credit portion of the price remained unpaid, whether the payment of the credit portion was conditioned on the performance of remedial work, or whether the conditions had been fulfilled by completing the remedial work.

The Notes, which contained the suspensive conditions that remedial work be completed and liens be cancelled, were not recorded. The act of sale referred to the Notes, but did not itself set forth the conditions. Any prospective purchaser of the property who (like C'est La Place) obtained copies of the Notes and examined the apartment complex, would have seen that the repairs were incomplete and that the Notes were not yet due. It is significant that C'est La Place could have defeated Groner's motion for default had C'est La Place received the requisite notice of the default proceedings.

Moreover, the facts of this case further evidence the flaws in the Court of Appeal's reasoning and belie the suggestion that the public records constituted the best

practicable notice available under the circumstances:

1. While the conveyance records contain a credit sale in the chain of title to this property, C'est La Place had direct knowledge that payment of the Notes was conditioned on the repair of the defective exterior siding (among other things).

2. C'est La Place had direct knowledge that the siding had not been repaired.

3. Groner had business dealings with Magnus and C'est La Place after they purchased the property. These dealings included negotiations regarding the construction deficiencies and the problems with the contractor Groner itself had engaged to *repair the exterior siding.*

4. Before filing suit Groner was aware that Magnus was a representative of the owner of the property and knew Magnus' whereabouts.

5. Groner sent the "demand letters" *only* to CBS, with knowledge that CBS was no longer in business and that CBS's president had committed suicide more than one year before Groner sent the letters.

6. C'est La Place did not find out that the "demand letters" were sent until after the default judgment was rendered against CBS.

7. After Groner filed suit, its counsel agreed to give C'est La Place a thirty-day extension of time to answer. During this grace period, however, Groner proceeded to obtain a default judgment against C'est La Place's co-defendant and predecessor in title.

8. C'est La Place received no notice of default proceedings, even though Groner knew C'est La Place's whereabouts. Groner could easily have informed C'est La Place's attorney of the pendency of the default proceedings.

Even under these extreme circumstances, the Court of Appeal held that C'est La Place was not entitled to notice prior to Groner's exercising its rights under Louisiana Civil Code article 2561 to dissolve a sale, which "dissolution had the effect of abrogating all subsequent alienations...including the subsequent sales to Magnus and C'est La Place." 432 So.2d at 1146.

CONCLUSION

The Louisiana Court of Appeal's decision violates the fundamental notions of fairness and the mandate of the Fourteenth Amendment to the United States Constitution, and the pronouncements of this Court. C'est La Place respectfully submits that this case merits this Court's attention and plenary consideration.

Respectfully submitted,

CHAFFE, McCALL, PHILLIPS,
TOLER & SARPY

BY: Corinne Ann Morrison

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Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that all parties who are required to be served with a copy of this Jurisdictional Statement are:

1. Groner Apartments
   through its counsel of record
   Mr. James P. Ryan
   P.O. Drawer 7090
   Opelousas, Louisiana 70570

2. William J. Guste, Jr.
   Attorney General
   7th Floor, 234 Loyola Building
   New Orleans, Louisiana 70112

I hereby certify that a copy of this Jurisdictional Statement has been served on the above-listed parties by United States mail, first class, postage prepaid. I further certify that Controlled Building Systems, Inc., an originally named defendant, is no longer registered as a corporation with the Louisiana Secretary of State and is apparently defunct. Accordingly, Controlled Building Systems, Inc. is not interested in this Appeal and service of it is not required.

New Orleans, Louisiana, this 4th day of January, 1984.

Corinne Ann Morrison

CORINNE ANN MORRISON

APPENDIX "A"

GRONER APARTMENTS,

Plaintiff-Appellee,

v.

CONTROLLED BUILDING SYSTEMS, et al.,

Defendants-Appellants.

No. 83-30

Court of Appeal of Louisiana,
Third Circuit

May 25, 1983

Vendor brought suit to rescind sale and subsequent alienations on account of purchaser's default in payment of purchase price and for revenues derived from property while in possession of original purchaser and subsequent third-party purchaser. The Sixteenth Judicial District Court, Parish of Iberia, Robert M. Fleming, J., entered a default judgment against the original purchaser. The third-party purchaser moved to annul the default judgment. the trial court dismissed third-party purchaser's motion to annul the default judgment, rendered judgment for plaintiff dissolving all subsequent alienations and encumbrances, but dismissed plaintiff's claim against third-party purchaser for revenues derived from the property while in its possession. Defendant appealed and plaintiff answered the appeal. The Court of Appeal, Yelverton, J., held that: (1) third-party purchasers need not be made parties to action

for dissolution for it to be valid; (2) property was properly freed from all subsequent encumbrances and alienations following valid default judgment against original purchaser; and (3) third-party purchaser was accountable for fair rental value during its possession of property.

Affirmed in part and remanded.

Chaffe, McCall, Phillips, Toler & Sarpy, Corinne Ann Morrison, New Orleans, for defendants-appellants.

Morrow & Morrow, James P. Ryan, Opelousas, for plaintiff-appellee.

Before DOUCET, YELVERTON and KNOLL, JJ.

YELVERTON, Judge.

This is a suit to rescind a sale and all subsequent alienations on account of the vendee's default in payment of the purchase price, and for revenues derived from the property while in the possession of the original vendee and a subsequent third party purchaser.

On October 25, 1979, the plaintiff, Groner Apartments (a partnership consisting of the Groner family), by act of credit sale transferred certain immovable property in Iberia parish to the defendant, Controlled Building Systems, Inc. (CBS). The agreed purchase price was $231,000 together with the assumption of an FMHA mortgage loan. The act of sale recited the following method of payment.

"...This sale is made and accepted for and in

consideration of the sum of Two Hundred Thirty One Thousand and No/100 ($231,000.00) Dollars, of which amount Vendee has paid the sum of Forty-Six Thousand and No/100 ($46,000.00) Dollars, cash in hand paid, the receipt, adequacy and sufficiency of which are hereby acknowledged and for which acquittance is herein granted.

"In order to represent the balance of One Hundred Eighty-Five Thousand and No/100 ($185,000.00) Dollars, Vendee has made and delivered to Vendor, who acknowledges receipt thereof, two (2) certain promissory notes, as follows:

"(a) Promissory Note of even date herewith in the amount of Forty Thousand and No/100 ($40,000.00) Dollars made payable to Vendor and payable as therein provided; and

"(b) Promissory Note of even date herewith in the amount of One Hundred Forty-Five Thousand and No/100 ($145,000.00) Dollars made payable to Vendor and payable as therein provided."

The act of sale was recorded in Iberia Parish on November 7, 1979. On November 9, 1979, CBS sold the property to Alexander Mangus for a purchase price of $476,000 and the assumption of the FMHA mortgage loan. The act of sale recited that $276,000 was paid in cash with the balance represented by a promissory note in the amount of $200,000. This sale was recorded in Iberia Parish on November 15, 1979. On December 12, 1980, Mangus sold the apartments to C'Est La Place, a partnership, for $118,226. In the summer of 1981 the Groners sent CBS several demand letters for payment on the promissory notes. However, CBS failed to respond evidently due to the

fact that the company had ceased doing business and had filed bankruptcy.

On August 26, 1981, Groner Apartments filed the present suit against CBS and C'Est La Place. The petition alleged that CBS had failed to make payments on the two promissory notes and had only paid $15,000 in cash at the time of the sale instead of the recited $46,000 in cash, and for this reason the plaintiff sought dissolution of the October 29, 1979, sale and a return of the property free of all subsequent encumbrances and alienations. Plaintiff also prayed for the rents and fruits derived from the property from CBS to be offset by the amount the plaintiff received from the sale ($15,000). The plaintiff also made C'Est La Place a defendant in the suit seeking payment of the rents and fruits derived from the property since the latter's acquisition.

A preliminary default was entered against CBS on September 25, 1981, and confirmed on October 1, 1981. The default judgment granted the dissolution of the October 25, 1981 (sic), sale from the plaintiff to CBS and awarded the plaintiff a monetary judgment against CBS in the amount of $214,710.19 plus legal interest for the rents and fruits derived from the property.

C'Est La Place answered the suit on October 2, 1981. On October 6, 1981, C'Est La Place filed a motion for the annulment of the default judgment alleging that it was an indispensable party to the proceedings and did not receive notice of the default proceedings. On January 22, 1982, the trial court denied the motion. On June 22, 1982, C'Est La Place filed a reconventional demand against the plaintiff and the Groners individually alleging breach of contract on the part of the Groners. The trial was held on August 24

and 25, 1982. On October 18, 1982, the trial court rendered judgment dissolving all subsequent alienations and encumbrances placed on the property after the October 25, 1979, sale and returned the property to the plaintiff. The trial court also dismissed the plaintiff's claim against C'Est La Place for fruits and rents derived from the property as well as the defendant's reconventional demand against the plaintiff and the Groners.

The defendant has appealed raising the following issues: 1) whether the trial court erred in denying C'Est La Place's motion to annul the default judgment against CBS, and 2) whether the trial court erred in dissolving the subsequent alienations and encumbrances after the October 25, 1979, sale to CBS. Plaintiff answered the appeal contending that the trial court erred in failing to award judgment against C'Est La Place for the fruits and rents derived from the property during its possession.

C'Est La Place argues that the subsequent purchasers of the property (Mangus and C'Est La Place) were indispensable parties to the action in dissolution brought against CBS and since they were not given notice of the default proceedings the judgment therein was null and void. We disagree.

The right of dissolution is explained by the Supreme Court in *Silman v. McBee*, 311 So.2d 248 (La.1975), as follows:

> The right of a vendor to rescind the sale on account of the vendee's default in payment of the purchase price rests in articles 2045-2047 and 2561-2564 of the Civil Code.[3] Article 2045 provides:

> The dissolving condition is that which, when accomplished, operates the revocation of the obligation, placing matters in the same state as though the obligation had not existed.
>
> It does not suspend the execution of the obligation; it only obliges the creditor to restore what he has received, in case the event provided for in the condition takes place.
>
> This dissolving, or resolutory,[4] condition is implied in all commutative contracts[5] and takes effect upon the failure of either party to comply with his engagement and the demand for dissolution by the aggrieved party. La.Civil Code art. 2046 (1870).
>
> [1,2] Where the commutative contract is one of sale, the special rules governing the contract of sale must be consulted, in addition to the general principles announced above. *Id.* art. 2438. The principal obligation of the buyer is to pay the price of sale. *Id.* art. 2549(1). Upon his failure to do so, the vendor has two remedies available: one for the enforcement, or affirmance, of the contract and the other for its dissolution. (footnotes omitted)

In the present case the plaintiff asserted its right of dissolution under article 2561 of the Civil Code against CBS. It is clear that under article 2561 the vendor has a right to demand the dissolution of the sale for nonpayment of the purchase price and that such demand is a demand for the property itself and embraces in it the abrogation of any and all alienations and encumbrances placed upon it by the vendee. *Sliman v. McBee, supra;* and *Stevenson v. Brown,* 32 La.Ann. 461 (1880).

In *Stevenson, supra,* the plaintiff brought an action in resolution against his vendee and a subsequent purchaser. Concerning the right of the vendor to dissolve the sale by his vendee to a subsequent purchaser the Supreme Court stated:

> Wherever a right or title is by contract, express or implied, made to depend upon a condition, that right or title is defensible. Its holder can confer no greater right than he has himself, and, consequently, all alienations and encumbrances granted by him vanish when the condition happens. The vendor's action is one in revendication of the thing. One purchasing property must look to his titles. In the present case that title informed Wade that his vendor Brown had agreed that in the event of failure to pay the notes given for the price, the property was to revert to Stevenson. In informed him that Brown's title was defeasible, and dependent for its continuance upon the happening of a condition. One who acquires a title with such stipulations in it, takes it subject thereto. The question of registry has nothing to do with the case. The right of resolution is an independent substantive remedy, and is in no wise dependent upon the existence of a mortgage or privilege. A demand in resolution is a demand for the property itself, and embraces in it the abrogation of any and all alienations and encumbrances placed upon it by the vendee.

The case of *Durham v. Evans,* 377 So.2d 423 (La.App. 2nd Cir.1979) discussed whether subsequent purchasers or mortgagees are necessary parties to such an action. In that case the plaintiffs were owners of a 5/6 interest in the tract of land which they sold to the defendant. The defendant eventually instituted a suit for partition by licitation of the subject property against the owners of the

remaining 1/6 of the property. A sheriff's sale was held at which the defendant was the successful bidder. The plaintiffs instituted an action for dissolution of the original sale to the defendant. The trial court rendered judgment annulling the sale to the defendant and also rendered judgment annulling the judgment which ordered the partition, the sheriff's sale and the sheriff's deed which followed that judgment, even though that relief was not prayed for in plaintiff's petition for dissolution. The defendant argued that such judgment was null and void since the co-owners of the 1/6 of the property were not parties to the suit. The court explained:

> "In *Stevenson v. Brown, supra,* the Supreme Court said 'a demand in resolution is a demand for the property itself, and embraces in it the abrogation of any and all alienations and encumbrances placed upon it by the vendee.' We are aware of the fact that in that case the subsequent purchaser of the property was a defendant in the suit, *but the language used by the court indicates that the result would have been the same even if he had not been a party.*
>
> "In this instance, plaintiffs have a real and actual interest in the subject property, and they have the same vital interest in this action to annul the judgment which ordered a partition of that property and the sheriff's sale and the sheriff's deed which followed that judgment. We believe their interest is 'real and actual,' within the meaning of LSA-C.C.P. Art. 681. The judgment rendered by the trial court here is not adverse to the interests of the defendants in that suit, Leander Durham and Mrs. Tullis, but even if it was, we think that judgment, which annuls and dissolves the sale from plaintiffs to defendant, has the effect of freeing the property from

> the subsequent conveyances made by Evans or resulting from the partition suit which he filed." (emphasis added)

We feel that it is clear from the above language that subsequent third party purchasers need not be made parties to an action for dissolution to be valid. The public records were sufficient to put third parties on notice that the transaction was a credit sale in which a portion of the price remained unpaid and that some day the plaintiff might exercise his right to dissolve the sale against his original vendee for nonpayment of the purchase price. See *City Bank & Trust Co. v. Caneco Const., Inc.*, 341 So.2d 1331 (La.App. 3rd Cir.1976), writ denied 345 So.2d 52 (La.1977). For these reasons we hold that the trial court was correct in denying the defendant's motion to annul the default judgment rendered against CBS dissolving the October 25, 1979, sale between Groner Apartments and CBS.

Considering the issue of whether the trial court erred in dissolving all subsequent sales and mortgages by the original vendee, CBS, we find that a valid default judgment was rendered against CBS dissolving the October 25, 1979, sale. The dissolution had the effect of abrogating all subsequent alienations and encumbrances placed on the property by CBS, including the subsequent sales to Mangus (sic) and C'Est La Place. The trial court therefore did not err in freeing the subject property from all other encumbrances and alienations by CBS.

The last issue for our consideration is whether the trial court erred in denying playintiff the fruits and rents derived from the property by C'Est La Place.

Plaintiff sought judgment against C'Est La Place for

the fruits and revenues received by C'Est La Place while the property was in its possession. The trial court found that the plaintiff failed to prove by a preponderance of the evidence that C'Est La Place derived any fruits and revenues from the property. The plaintiff introduced extensive evidence to show the rent received from each tenant during the period of C'Est La Place's possession.

Under the jurisprudence it is clear that the defendant, whether the original vendee or a subsequent vendee, in an action for dissolution of the sale is accountable to the vendor for the fair rental value of the property during defendant's possession. "Fair rental value" has been held to be synonymous with the "fruits" and "revenues" derived from the property. *Thompson v. Bullock*, 236 So.2d 892 (La.App. 3rd Cir.1970) writ denied, 240 So.2d 231 (La.1970); *McKenzie v. Bacon*, 41 La.Ann. 6, 5 So. 640 (1889); *Cappel v. Hundley*, 168 La. 15, 121 So. 176 (La.1929); and C.C.art. 2506.

In *Thompson, supra*, the plaintiff offered evidence to establish the rent moneys received by the defendant but failed to offer evidence as to what the fair rental value of the apartment complexes would be to a lessor-operator. In holding that the case should be remanded to allow the plaintiff the opportunity to offer evidence as to such this court stated:

> [6] On the other hand, where the purchaser has gone into possession, the seller is entitled to recover the fair rental value of the premises, and the case will be remanded to establish such if not already in the record. *Scott v. Apgar*, [238 La. 29, 113 So.2d 457] cited above, at 113 So.2d 461. See also: *Ekman v. Vallery*, 185 La. 488, 169 So. 521; *Farthing v. Neely*, La.App.3d Cir., 129 So.2d 224.

> It is highly plausible that the rents collected by Bullock represent the fair rental value of the property, and thus that Mrs. Thompson is entitled to retain payments made from them. Nevertheless, we suppose the better practice would be to remand to establish fair rental value rather than to rest this finding upon conjecture.

In this case as in *Thompson, supra,* we will remand this case to establish the fair rental value of the property while in the defendant's possession.

For the reasons assigned the judgment of the trial court in favor of the plaintiff for dissolution of the sale is affirmed. The case is hereby remanded for the determination of the fair rental value of the property while in the possession of defendant C'Est La Place. All costs are to be borne by the defendant-appellant.

AFFIRMED IN PART and REMANDED.

APPENDIX "B"

16TH JUDICIAL DISTRICT COURT
PARISH OF IBERIA
STATE OF LOUISIANA

GRONER APARTMENTS

vs. NO. 48,246

CONTROLLED BUILDING SYSTEMS, INC. and
C'EST LA PLACE

REASONS FOR JUDGMENT

On August 26, 1981, the plaintiff filed this suit against Controlled Building Systems and C'est la Place, showing that in October of 1979 Groner Apartments sold to the defendant, Controlled Buildings Systems, Inc., a certain tract of land in Iberia Parish, and alleged that they failed to pay the purchase price, therefore, they wanted to rescind the sale. The plaintiffs then alleged that the defendant, Controlled Building Systems, Inc., had sold the subject property to C'est la Place, a foreign partnership, and that the sale against them was null also.

Controlled Building Systems, Inc. filed no response to these proceedings and a preliminary default was entered against them on September 25, 1981. On October 1, 1981 this judgment of default was confirmed in a nonadversary proceeding.

The plaintiff now moves for a summary judgment and sets up as a bar to any trial by the defendant, C'est la Place, the default judgment, saying that it is conclusive. This is a non sequitor.

While it may be that the judgment of default is conclusive as to Consolidated Building Systems, Inc., it is not conclusive as to C'est la Place, who has timely filed an answer to these proceedings and intends to defend the proceedings. If we follow the rationale set forth by the plaintiff, the mere fact that the judgment was confirmed would preclude C'est la Place from setting up any defense to these proceedings at all. It cannot operate to preclude C'est la Place from setting up any offenses or defenses that it may have. Therefore, there is a question in this Court's mind as to the applicability of a motion for a summary judgment in this case. Since there is a question of the applicability, the motion necessarily must be denied.

The defendant, C'est la Place, has filed a motion for the anullment of the judgment of confirmation and this, too, will be denied.

Let a formal judgment consistent with these views be presented for signature.

Officially in Chambers at New Iberia, this 22nd day of January, 1982.

ROBERT M. FLEMING
DISTRICT JUDGE

APPENDIX "C"

16TH JUDICIAL DISTRICT COURT
PARISH OF IBERIA
STATE OF LOUISIANA

GRONER APARTMENTS

vs. NO. 48,246

CONTROLLED BUILDING SYSTEMS, INC., ET AL

REASONS FOR JUDGMENT

On August 26, 1981, Groner Apartments, a Louisiana partnership composed of David W. Groner, Katherine Nelson Groner and Marilyn Lee Groner, filed this suit against Controlled Building Systems, Inc., a Louisiana Corporation, and C'est La Place, an Illinois partnership, seeking to set aside a sale dated October 25, 1979, whereby Groner Apartments sold to Controlled Building Systems, Inc. a tract of land which was subsequently by mesne conveyances sold to C'est La Place.

The sale by Groner Apartments to Controlled Building Systems, Inc. is dated October 25, 1979, and was made for a consideration of $231,000, of which the vendee paid $46,000 cash and the balance of the credit portion was represented by two promissory notes, one in the amount of $40,000 and the other in the amount of $145,000.

The credit deed was unusual in that it did not contain a mortgage in favor of the vendor for the unpaid balance and, further, it did contain a waiver of the vendor's lien in these words:

> It is specifically understood and agreed that the vendor shall not enjoy, and hereby waives and releases, the vendor's lien or privilege provided for in Article 3249, et seq, of the Revised Civil Code of the State of Louisiana, and otherwise granted by law.

Of great significance is the fact that the vendor did not waive his right to revoke the sale on account of the non-payment of the purchase price.

In the case of *Sliman vs. McBee,* 311 So.2d. 248 (S.Ct. 1975), the court emphasized that the right of the seller under Civil Code Article 2561, to dissolve the sale for failure of the buyer to pay the purchase price, is an entirely separate and independent remedy from the right of the seller to sue for any amount due on the purchase price. The Court stated:

> Where the commutative contract is one of sale, the special rules governing the contract of sale must be consulted, in addition to the general principles announced above. Article 2438. The principal obligation of the buyer is to pay the price of sale. Article 2549 (1). Upon his failure to do so, the vendor has two remedies available: one for the enforcement, or affirmance, of the contract, and the other for its dissolution. The second right, asserted here by Mrs. Sliman, is an independent, substantive remedy available under Article 2561 of the Civil Code that is in no way dependent upon the existence of the security device such as a mortgage or a privilege, which secures the first remedy of the seller, i.e., the enforcement of the buyer's obligation to pay the price agreed upon in the contract of sale.

The Sliman case has been uniformly followed since 1975, and it is the law today. In the Sliman case the vendor there also waived the vendor's lien and the Supreme Court ultimately revoked the sale and put the vendor in the position she was before the sale was made.

This Court comes to the same conclusion.

The issues in this case, while complex, boil down to the question of whether the two promissory notes issued as credit for the Groner-Controlled Building Systems sale are past due. If they are past due, then the Groners succeed in their revocatory action.

The $40,000 note contains the following language in addition to the usual verbiage found in promissory notes. They say:

> Anything herein contained to the contrary notwithstanding, it is specifically understood and agreed that maker shall be under no obligation hereunder unless and until all work (primary or remedial) to be performed or accomplished in connection with the construction and completion of the apartment complex being constructed on the properties described on Annex "A" hereof is completed in accordance with the specifications attached hereto, and made a part hereof, as Annex "B", failing which maker, rather than paying this note in accordance with its tenor to the holder or holders hereof, may apply the monies otherwise due and owing hereunder to the performance and accomplishment of the aforementioned matters, and any such monies so applied shall constitute a credit against monies due and owing hereunder.

The $145,000 contains a clause which is almost

identical to the above quoted one. The documents identified with the note is a certificate of substantial completion executed by James L. Firmin, architect, Landura Corporation of Louisiana, contractor, and David Groner, as owner, and attached to it is a punch list showing the corrective items necessary for the completion of the building. The punch list contains 15 items. Of the 15 items on the punch list everything was completed except Item 1-B, which says, "The exterior hardboard siding is not acceptable in its present condition. Siding should be replaced."

Groner Apartments, as the name indicates, began the construction of an apartment complex on some land in Iberia parish, and executed a mortgage in favor of the Farmers Home Administration, which mortgage was assumed by Controlled Business Systems. The apartment complex was nearly complete when the aforesaid credit sale was executed. The question of the exterior siding was never successfully completed. Groner Apartments was in financial distress at and after the sale to Controlled Building Systems. It recognized the obligation to correct the siding and in an effort to do so they secured a bid from Leon Guillory Building Contractor, Inc. to complete this work for $46,835. Of that amount $19,870 was to be paid upon completion from mortgage funds on hand, and the remaining amount of $25,965 was to be paid by Controlled Building Systems, Inc. from funds owed Groner Apartments (according to the bid.) The bid also said that, "This amount to be deducted from the total amount owed Groner Apartments by Controlled Building Systems, Inc." Groner Apartments did not have the cash at hand to pay the portion of the siding bill, a fact which was known to the defendants, and Groner Apartments called upon the defendants to deduct that amount from the notes that were due them and to pay the notes according to their tenor. The

defendants failed to do so after much demand was put on them to live up to their obligation. This Court finds that the notes were due according to their terms and upon the defendants' failure to pay the notes the plaintiff properly instituted this revocatory action.

It is the opinion of this Court that the plaintiff should have judgment against Controlled Building Systems, Inc. and C'est La Place, declaring the act of sale of October 25, 1979 to be dissolved, and the property returned to petitioner, free from all subsequent alienations and encumbrances. The plaintiff asks for damages for fruits and profits of the subject property since the sale, but these items were not proved by a preponderance of the evidence.

On June 22, 1982 the defendant, C'est La Place, filed a reconventional demand and for the reasons above stated it must fall.

Let a formal judgment consistent with these views be prepared by the attorneys Morrow and Morrow, representing the plaintiff, and submitted to John W. Hutchinson, attorney for C'est La Place, for approval "as to form", and then submitted to this Court for signature.

Officially in Chambers on this 29th day of September, 1982, at Franklin, St. Mary Parish, Louisiana.

ROBERT M. FLEMING
DISTRICT JUDGE

APPENDIX "D"

RECORDED IN MORTGAGE BOOK A421 AT FOLIO 533, ENTRY NO. 81-8145

16TH JUDICIAL DISTRICT COURT

DOCKET NO. 48,246

IBERIA PARISH, LOUISIANA

GRONER APARTMENTS

VERSUS

CONTROLLED BUILDING SYSTEMS, INC., ET AL

JUDGMENT

This matter came to be heard on Thursday, October 1, 1981, and, after considering the pleadings and the evidence, the court considering the law and the evidence to be in favor of plaintiff, GRONER APARTMENTS and against defendant, CONTROLLED BUILDING SYSTEMS, INC.:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff, GRONER APARTMENTS, and against defendant, CONTROLLED BUILDING SYSTEMS, INC., dissolving forever the act of sale between the parties dated October 25, 1979, and introduced at trial as Plaintiff's Exhibit 2.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff, GRONER APARTMENTS, and against defendant

CONTROLLED BUILDING SYSTEMS, INC., in the full sum of TWO HUNDRED FOURTEEN THOUSAND SEVEN HUNDRED TEN AND 19/100 ($214,710.19) DOLLARS, together with legal interest thereon from date of judicial demand until paid and for all costs of these proceedings.

New Iberia, LOUISIANA, this 1st day of October, 1981.

_____

HONORABLE ROBERT E. JOHNSON

MORROW & MORROW
Attorneys for Plaintiff

BY:_____
JAMES P. RYAN
P.O. Box 897
324 W. Landry
Opelousas, LA 70570

Filed October 2, 1981
Time 10:02 A.M.

_____

M. A. BONIN, DTY. CLERK

APPENDIX "E"

16TH JUDICIAL DISTRICT COURT

DOCKET NO. 48,246

IBERIA PARISH, LOUISIANA

GRONER APARTMENTS

VERSUS

CONTROLLED BUILDING SYSTEMS, INC., ET AL

JUDGMENT

This cause came to be heard on Friday, January 22, 1982, pursuant to a Motion for Summary Judgment filed on behalf of plaintiff and a Motion for Annulment of Judgment filed on behalf of the defendant, C'EST LA PLACE. When, after hearing argument and after considering the record, pleadings, evidence, testimony and briefs of the parties hereto, and pursuant to written reasons for judgment;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of defendant, C'EST LA PLACE, and against the plaintiff, GRONER APARTMENTS, denying the Motion for Summary Judgment filed by plaintiff herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff, GRONER APARTMENTS, and against the defendant, C'EST LA PLACE, denying the Motion for Annulment of Judgment filed by defendant, C'EST LA PLACE.

Franklin, Louisiana, this 4th day of February.

_____
DISTRICT JUDGE

APPROVED AS TO FORM:

MORROW & MORROW
Attorneys for Plaintiff

BY:_____
JAMES P. RYAN

VOORHIES & LABBE
Attorneys for Defendant

BY:_____
JOHN W. HUTCHISON

Filed Feb. 5, 1982
Signed: ANN M. MORROW, Dty. Clk.

APPENDIX "F"

RECORDED IN CONVEYANCE BOOK 800 AT FOLIO 713, ENTRY NO. 82-9042

EXHIBIT "C"

16TH JUDICIAL DISTRICT COURT

DOCKET NO. 48,246

IBERIA PARISH, LOUISIANA

GRONER APARTMENTS

VERSUS

CONTROLLED BUILDING SYSTEMS, INC., ET AL

JUDGMENT

This matter came to be tried on August 24 and 25, 1982, and, after considering the pleadings, evidence and briefs, for reasons stated in written reasons for judgment signed by the Court on September 29, 1982, considering the law and the evidence to be in favor of plaintiff, GRONER APARTMENTS, and against defendants, CONTROLLED BUILDING SYSTEMS, INC., and C'EST LA PLACE;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff, GRONER APARTMENTS, and against the defendant, CONTROLLED BUILDING SYSTEMS, INC., and C'EST LA PLACE, declaring the act of sale of October 25, 1979, to be forever dissolved and that the following described property be returned to plaintiff, GRONER

APARTMENTS, free of all subsequent alienations and encumbrances, to-wit:

That certain tract of land with all buildings and improvements thereon, together with all rights, ways, privileges, servitudes and appurtenances thereunto appertaining, situated in the Second Ward of Iberia Parish, Louisiana, measuring Three Hundred (300) Feet front on U.S. Hwy 90 and being more particularly described as follows: Beginning at a point on U.S. Hwy. 90 at the intersection of the North right-of-way line of said U.S. Hwy. 90 and the West right-of-way line of the Pharr Canal, being the Southeast corner of this said tract of land, thence North 25°21' East along the West right-of-way line of said Pharr Canal a distance of Eight Hundred Forty-Two (842) Feet to the South bank of Bayou Teche, being the Northeast corner of this said tract of land, thence West along the meander line of the South bank of said Bayou Teche a distance of Three Hundred One (301) Feet, more or less, to a point on said South bank of said Bayou Teche, said point being the Northwest corner of this tract of land, thence South 25°21' West a distance of Eight Hundred Twenty (820) Feet to the North right-of-way line of said U.S. Hwy. 90, being the Southwest corner of this said tract of land, thence South 64° East along the North right-of-way line of said U.S. Hwy. 90 a distance of Three Hundred (300) Feet to the point of beginning, bounded Northerly by said Bayou Teche; Southerly by said U.S. Hwy. 90; Easterly by said Pharr Canal; and westerly by Lot 5 of Block 3 of Minvielle Subdivision according to a plat of survey thereof by G. K. Pratt Munson, Civil Engineer, dated May 15, 1956, of record in Miscellaneous Book 9, Folio 140, records of Iberia Parish, Louisiana (property of Christopher Louis Daly, Jr.), and Amy Street

of said Minvielle Subdivision. Being THE EASTERLY THREE HUNDRED (300) FEET of that property sold by Teche Sugar Company, Inc., to Leon J. Minvielle as shown by a plat of survey prepared by W. K. Frantz, Civil Engineer, dated April 4, 1941, of record under Original Conveyance Entry No. 60097, records of Iberia Parish, Louisiana, and being located in Section 40, T-12-S, R-7-E, Southwestern Land District of Louisiana.

Being the same property acquired by Marion W. Groner from Leon J. Minvielle, Sr., et al, in part, by act dated and filed for record December 1, 1958, in Conveyance Book 342, Folio 441, entry No. 110591, in part by act dated December 1, 1959, filed for record December 10, 1959, in Conveyance Book 363, Folio 234, Entry No. 114256, records of Iberia Parish, Louisiana; and, in part, by act dated February 27, 1964, filed for record March 5, 1964, in Conveyance Book 448, Folio 192, Entry No. 128821, all of the records of Iberia Parish, Louisiana.

LESS AND EXCEPT:

1. A certain lot of ground measuring One Hundred Sixty-Seven (167) Feet front on the Northerly side of Louisiana Hwy. 182 by a depth between parallel lines of One Hundred Fifty-Five (155) Feet, bounded Northerly by Groner; Southerly by Louisiana Hwy. 182, Easterly by Fifty (50) Foot strip included in Groner Apartments, and Westerly by Amy Street.

2. A certain lot of ground, unimproved, measuring Eighty-Three (83) Feet front on the Northerly side of Louisiana Hwy. 182, by a depth of One Hundred Twenty-Five (125) Feet, and having a width in the rear of One Hundred Three (103)

Feet, bounded Northerly by Groner; Southerly by Louisiana Hwy. 182; easterly by Pharr Canal; and Westerly by Fifty (50) Foot strip belonging to Groner Apartments.

The above described tract less the two exclusions, contains Four and 84/100 (4.84) acres.

Being a portion of the same property acquired by Katharine Nelson Groner, Marilyn Lee Groner and David W. Groner from the Succession of Marion W. Groner, Probate Docket No. 9745; Judgment of Possession dated June 8, 1976, recorded at COB 650, Folio 287, under Entry No. 76-3508, Iberia Parish Records.

Being the same property described in that certain Agreement to Buy and Sell Immovable Property executed by Groner Apartments in favor of Controlled Builders of Louisiana, Inc., dated July 19, 1979, recorded July 23, 1979, COB 713, Folio 713, Entry No. 79-6385, Conveyance Records of Iberia Parish, Louisiana.

Together with all improvements, buildings, constructions and other structures situated thereon or appertaining thereto.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff, GRONER APARTMENTS, and against defendants, CONTROLLED BUILDING SYSTEMS, INC., and C'EST LA PLACE, jointly and in solido, for all costs of these proceedings.

New Iberia, LOUISIANA, this 18th day of October, 1982.

_____
DISTRICT JUDGE

APPROVED:

MORROW & MORROW
Attorneys for Plaintiff

BY:_____
JAMES P. RYAN

VOORHIES & LABBE
Attorneys for Defendant

BY:_____
JOHN W. HUTCHISON

Filed Oct. 18, 1982
Signed: George Reeves, DTY. CLK.

APPENDIX "G"

THE SUPREME COURT
OF THE STATE OF LOUISIANA

NO. 83-C-1449

GRONER APARTMENTS

VS

CONTROLLED BUILDING SYSTEMS
AND C'EST LA PLACE

In Re: C'Est La Place applying for Certiorari or Writ of Review, to the Court of Appeal, Third Circuit, No. 83-30; from the 16th Judicial District Court, Parish of Iberia, No. 48,246

October 7, 1983

Denied.

JLD

WFM

JCW

HTL

DIXON, C.J., concurs in the denial. C'est La Place was a named defendant, was served (then a default judgment was entered and confirmed against CBS), answered and another

trial was held. Therefore the result is correct.

CALOGERO & BLANCHE, J.J., would grant the writ.

Supreme Court of Louisiana
October 7, 1983

_____

Clerk of Court
For the Court

APPENDIX "H"

THE SUPREME COURT OF
THE STATE OF LOUISIANA
NO. 83-C-1449

GRONER APARTMENTS

VS.

CONTROLLED BUILDING SYSTEMS
AND C'EST LA PLACE

NOTICE OF APPEAL

NOTICE is hereby given that C'est La Place hereby appeals to the Supreme Court of the United States from the denial of C'est La Place's Petition for Certiorari or Review to the Louisiana Supreme Court dated October 7, 1983, the judgment of the Third Circuit Court of Appeal, State of Louisiana, dated May 25, 1983 and the judgments of the 16th Judicial District Court for the Parish of Iberia, State of Louisiana, in Civil Action No. 48,246 entered on October 2, 1981, February 5, 1982 and October 18, 1982.

This appeal is taken pursuant to 28 USC §1257(2).

Respectfully submitted,

CHAFFE, McCALL, PHILLIPS,
TOLER & SARPY

BY: _____

Corinne Ann Morrison
Attorneys for C'est La Place
1500 First N.B.C. Building
New Orleans, Louisiana 70112
Telephone: (504) 568-1320

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Notice of Appeal has been forwarded to counsel for Groner Apartments, James P. Ryan, by placing same in the United States mail, properly addressed with postage prepaid. No service has been made on Controlled Building Systems, Inc. because this corporation is no longer registered as a corporation with the Louisiana Secretary of State and appears to be defunct. As a result, Controlled Building Systems, Inc. is not interested in this appeal.

New Orleans, Louisiana, this 3rd day of November, 1983.

CORINNE ANN MORRISON

APPENDIX "I"

STATE OF LOUISIANA
COURT OF APPEAL
THIRD CIRCUIT
NO. 83-80

GRONER APARTMENTS

VS.

CONTROLLED BUILDING SYSTEMS
AND C'EST LA PLACE

NOTICE OF APPEAL

NOTICE is hereby given that C'est La Place hereby appeals to the Supreme Court of the United States from the denial of C'est La Place's Petition for Certiorari or Review to the Louisiana Supreme Court dated October 7, 1983, the judgment of the Third Circuit Court of Appeal, State of Louisiana, dated May 25, 1983 and the judgments of the 16th Judicial District Court for the Parish of Iberia, State of Louisiana, in Civil Action No. 48,246 entered on October 2, 1981, February 5, 1982 and October 18, 1982.

This appeal is taken pursuant to 28 USC §1257(2).

Respectfully submitted,

CHAFFE, McCALL, PHILLIPS,
TOLER & SARPY

BY: _____

Corinne Ann Morrison
Attorneys for C'est La Place
1500 First N.B.C. Building
New Orleans, Louisiana 70112
Telephone: (504) 568-1320

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Notice of Appeal has been forwarded to counsel for Groner Apartments, James P. Ryan, by placing same in the United States mail, properly addressed with postage prepaid. No service has been made on Controlled Building Systems, Inc. because this corporation is no longer registered as a corporation with the Louisiana Secretary of State and appears to be defunct. As a result, Controlled Building Systems, Inc. is not interested in this appeal.

New Orleans, Louisiana, this 3rd day of November, 1983.

CORINNE ANN MORRISON

APPENDIX "J"

16TH JUDICIAL DISTRICT COURT
PARISH OF IBERIA
STATE OF LOUISIANA
NO. 48,246

GRONER APARTMENTS

VS.

CONTROLLED BUILDING SYSTEMS
AND C'EST LA PLACE

NOTICE OF APPEAL

NOTICE is hereby given that C'est La Place hereby appeals to the Supreme Court of the United States from the denial of C'est La Place's Petition for Certiorari or Review to the Louisiana Supreme Court dated October 7, 1983, the judgment of the Third Circuit Court of Appeal, State of Louisiana, dated May 25, 1983 and the judgments of the 16th Judicial District Court for the Parish of Iberia, State of Louisiana, in Civil Action No. 48,246 entered on October 2, 1981, February 5, 1982 and October 18, 1982.

This appeal is taken pursuant to 28 USC §1257(2).

Respectfully submitted,

CHAFFE, McCALL, PHILLIPS,
TOLER & SARPY

BY: _____

Corinne Ann Morrison
Attorneys for C'est La Place
1500 First N.B.C. Building
New Orleans, Louisiana 70112
Telephone: (504) 568-1320

CERTIFICATE OF SERVICE

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New Orleans, Louisiana, this 3rd day of November, 1983.

CORINNE ANN MORRISON

APPENDIX "K"

16TH JUDICIAL DISTRICT COURT
DOCKET NO. 48246
IBERIA PARISH, LOUISIANA

GRONER APARTMENTS

VERSUS

CONTROLLED BUILDING SYSTEMS, INC., ET AL

PETITION FOR DISSOLUTION OF SALE
OF IMMOVABLE PROPERTY

The petition of GRONER APARTMENTS, a Louisiana ordinary partnership composed of DAVID W. GRONER, KATHERINE NELSON GRONER, and MARILYN LEE GRONER, and having its principal place of business in Iberia Parish, Louisiana, respectfully represents:

1.

Made defendants herein are: CONTROLLED BUILDING SYSTEMS, INC., a Louisiana corporation having its principal place of business in Lafayette Parish, Louisiana; and C'EST LA PLACE, a foreign partnership organized under the laws of the State of Illinois and authorized to do and doing business in the State of Louisiana.

2.

On October 25, 1979, GRONER APARTMENTS

sold to CONTROLLED BUILDING SYSTEMS, INC., a certain tract of land, together with improvements thereon, situated in Iberia Parish, Louisiana. A copy of the Act of Sale between petitioner, GRONER APARTMENTS, and defendant, CONTROLLED BUILDING SYSTEMS, INC., is attached hereto as EXHIBIT A. The said Act of Sale was recorded in the Conveyance Records of the Parish of Iberia, Louisiana, on November 7, 1979, in COB 720, at Folio 778, Original Act No. 79-9710.

3.

The price for the sale of the property described in the attached Act of Sale, Exhibit A, was TWO HUNDRED THIRTY-ONE THOUSAND AND NO/100 ($231,000.00) DOLLARS.

4.

The attached Act of Sale recites that FORTY-SIX THOUSAND AND NO/100 ($46,000.00) DOLLARS of the selling price of TWO HUNDRED THIRTY-ONE THOUSAND AND NO/100 ($231,000.00) DOLLARS was received by GRONER APARTMENTS as of the date of the Act of Sale. Due to error of the parties and/or fraud on behalf of CONTROLLED BUILDING SYSTEMS, INC., only FIFTEEN THOUSAND AND NO/100 ($15,000.00) DOLLARS of the recited sum of FORTY-SIX THOUSAND AND NO/100 ($46,000.00) DOLLARS was received by GRONER APARTMENTS.

5.

As of the date of the attached Act of Sale, defendant, CONTROLLED BUILDING SYSTEMS, INC., owes to

petitioner herein, GRONER APARTMENTS, the sum of TWO HUNDRED SIXTEEN THOUSAND AND NO/100 ($216,000.00) DOLLARS.

6.

The said Act of Sale recites that ONE HUNDRED EIGHTY-FIVE THOUSAND AND NO/100 ($185,000.00) DOLLARS of the selling price would be represented by two certain promissory notes, executed the same date as the Act of Sale, one note being in the amount of FORTY THOUSAND AND NO/100 ($40,000.00) DOLLARS, and the other note being in the amount of ONE HUNDRED FORTY-FIVE THOUSAND AND NO/100 ($145,000.00) DOLLARS. The promissory note in the amount of FORTY THOUSAND AND NO/100 ($40,000.00) DOLLARS is a demand note in which CONTROLLED BUILDING SYSTEMS, INC. promises to pay to petitioner the amount of the note upon demand and satisfaction of certain conditions by petitioner. The promissory note in the amount of ONE HUNDRED FORTY-FIVE THOUSAND AND NO/100 ($145,000.00) DOLLARS provides that defendant, CONTROLLED BUILDING SYSTEMS, INC., will pay to GRONER APARTMENTS the face value of the note together with interest thereon at the rate of eight (8%) percent per annum, payable in yearly installments from date in the amount of THIRTY-SIX THOUSAND TWO HUNDRED FIFTY AND NO/100 ($36,250.00) DOLLARS per year plus interest.

7.

On the date of the said Act of Sale, October 25, 1979, CONTROLLED BUILDING SYSTEMS, INC., had already taken possession of the property described therein

and had begun renting the apartment units located thereon and collecting rent. Only two (2) days after the attached Act of Sale was recorded in the Conveyance Records of Iberia Parish, defendant, CONTROLLED BUILDING SYSTEMS, INC., resold the property for FOUR HUNDRED SEVENTY-SIX THOUSAND FOUR HUNDRED EIGHTY AND NO/100 ($476,480.00) DOLLARS and was therefore no longer the owner of this property as of November 9, 1979.

8.

Despite petitioner having complied with all conditions of the Act of Sale and promissory notes, CONTROLLED BUILDING SYSTEMS, INC., has failed to pay any of the outstanding purchase price in the amount of TWO HUNDRED SIXTEEN THOUSAND AND NO/100 ($216,000.00) DOLLARS to petitioner herein. Despite amicable demand by petitioner and good faith efforts to collect the credit balance of the selling price, CONTROLLED BUILDING SYSTEMS, INC., has acted in bad faith in refusing to pay the amount due to petitioner and has ignored petitioner's attempts to collect the balance of the price.

9.

Since defendant, CONTROLLED BUILDING SYSTEMS, INC., has failed to pay the price when due and has acted in such a manner as to render it an impossibility for petitioner to collect the price, petitioner no longer desires to have the price paid and demands that the property and improvements thereon be returned to petitioner, free from all alienations and encumbrances placed upon the said property by CONTROLLED BUILDING SYSTEMS,

INC., and all subsequent vendees.

10.

Petitioner attaches hereto copies of the two promissory notes executed by CONTROLLED BUILDING SYSTEMS, INC., in favor of GRONER APARTMENTS as Exhibits B and C. The original notes will be filed into the record of this matter and stored in the safe of the Clerk of Iberia Parish, Louisiana.

11.

Since defendant, CONTROLLED BUILDING SYSTEMS, INC., has failed to pay the price when due, it is liable to petitioner herein for all fruits and rents derived from the property since the date of sale, less the portion of the purchase price paid. Upon information and belief, petitioner alleges the amount of rents derived from the property since the date of sale (plus interest), less the amount of the purchase price paid (plus interest), to be in the amount of ONE HUNDRED SEVENTY FIVE THOUSAND AND NO/100 ($175,000.00) DOLLARS, plus interest. Petitioner herein is prepared to deposit into the registry of the court any part of the purchase price paid which is not offset by the value of the rental owed to petitioner by CONTROLLED BUILDING SYSTEMS, INC.

12.

Defendant, C'EST LA PLACE, is the current owner of the property described in Exhibit A and is thus a necessary party to these proceedings. Since defendant, C'EST LA PLACE, purchased the said property on the faith of the public records, which showed a credit sale

between petitioner and CONTROLLED BUILDING SYSTEMS, INC., it is entitled to no greater rights than held by CONTROLLED BUILDING SYSTEMS, INC., who failed to pay the price when due. Defendant, C'EST LA PLACE, is liable to petitioner for the value of all rents derived from the subject property (plus interest) since acquiring the same.

13.

Petitioner avers amicable demand without avail.

WHEREFORE, premises considered, PETITIONER PRAYS that defendants, CONTROLLED BUILDING SYSTEMS, INC., and C'EST LA PLACE, be cited and served with a copy of this petition and be required to answer same, and that after due proceedings had, there be judgment herein in favor of petitioner, GRONER APARTMENTS, and against defendant, CONTROLLED BUILDING SYSTEMS, INC. declaring the Act of Sale of October 25, 1979, to be forever dissolved and the property described therein be returned to petitioner, free from all subsequent alienations and encumbrances.

PETITIONER FURTHER PRAYS that there be judgment in favor of petitioner and against defendant, CONTROLLED BUILDING SYSTEMS, INC., in the amount of ONE HUNDRED SEVENTY-FIVE THOUSAND AND NO/100 ($175,000.00) DOLLARS, or whatever amount is found due by this Honorable Court, for fruits and profits of the subject property since October 25, 1979.

PETITIONER FURTHER PRAYS that there be judgment in its favor and against defendant, C'EST LA

PLACE, ordering said defendant to surrender the subject property to GRONER APARTMENTS and to pay to GRONER APARTMENTS the amount of all rents collected since the date of acquisition of the subject property.

PETITIONER FURTHER PRAYS that defendants be cast for all costs of these proceedings and for all general and equitable relief.

MORROW & MORROW

Attorneys for Petitioner

BY: _____
JAMES P. RYAN
P. O. Box 897
Opelousas, LA 70570

SERVICE INFORMATION:

C'EST LA PLACE, by and through
its agent for service of process,
C. T. Corporation System
1300 Hibernia Building
New Orleans, Louisiana 70112

and

CONTROLLED BUILDING SYSTEMS, INC.
by and through its agent for service
of process,
Patrick Ottinger
201 Travis Street
P.O. Drawer 52806
Lafayette, LA 70505

APPENDIX "L"

PLAINTIFF'S EXHIBIT 3

NEGOTIABLE PAPER

$145,000.00 Opelousas, Louisiana
October 25th, 1979

For value received, I promise to pay to GRONER APARTMENTS the principal sum of ONE HUNDRED FORTY-FIVE THOUSAND AND NO/100 ($145,000.00) DOLLARS together with interest thereon from the date hereof at the rate of eight (8%) per cent per annum payable, as follows:

> On or before annual anniversary dates hereof, commencing one (1) year from the date hereof, Maker shall pay the sum of THIRTY-SIX THOUSAND TWO HUNDRED FIFTY AND NO/100 ($36,250.00) DOLLARS, plus interest then owing as hereinabove provided, until paid in full,

such principal and interest thereon being payable in lawful money of the United States of America which shall be legal tender in payment, at the office of Minos H. Armentor, Esq., New Iberia, Louisiana, or at such other place, either within or without the State of Louisiana, as the holder or holders hereof may from time to time designate.

It is hereby agreed that, if default be made in the payment of the principal sum hereinabove mentioned, or any installment thereof, or any interest thereon, as above described, then, in any and all such events, the entire amount of the principal of this note with all interest then accrued, shall, at the option of the holder or holders of this

note, become and be due and collectible. It is agreed that the interest rate shall be eight (8%) per cent per annum on any sum payable hereunder after the same becomes due and collectible and until paid.

The makers, endorsers, guarantors and sureties of this note hereby severally waive presentation for payment, demand, notice of non-payment and protest, all pleas of division and discussion. If this note is placed in the hands of an Attorney for judicial collection, or if suit is filed on this note, they further agree to pay all Attorney's fees incurred in the judicial collection of this note, which fees are hereby fixed at fifteen (15%) per cent of the principal and interest then owing on said note, or sued for, or claimed to be owing to the holder or holders of this note. This note may be prepaid without penalty.

ANYTHING HEREIN CONTAINED TO THE CONTRARY NOTWITHSTANDING, IT IS SPECIFICALLY UNDERSTOOD AND AGREED THAT MAKER SHALL BE UNDER NO OBLIGATION HEREUNDER UNLESS AND UNTIL ALL WORK (PRIMARY OR REMEDIAL) TO BE PERFORMED OR ACCOMPLISHED IN CONNECTION WITH THE CONSTRUCTION AND COMPLETION OF THE APARTMENT COMPLEX BEING CONSTRUCTED ON THE PROPERTIES DESCRIBED IN THE MORTGAGE WITH WHICH THIS NOTE IS IDENTIFIED AND BY WHICH THIS NOTE IS SECURED, IS COMPLETED IN ACCORDANCE WITH THE SPECIFICATIONS ATTACHED HERETO, AND MADE A PART HEREOF, AS ANNEX "A", FAILING WHICH MAKER, RATHER THAN PAYING THIS NOTE IN ACCORDANCE WITH ITS TENOR TO THE HOLDER OR HOLDERS HEREOF, MAY APPLY THE MONIES

OTHERWISE DUE AND OWING HEREUNDER TO THE PERFORMANCE AND ACCOMPLISHMENT OF THE AFOREMENTIONED MATTERS, AND ANY SUCH MONIES SO APPLIED SHALL CONSTITUTE A CREDIT AGAINST MONIES DUE AND OWING HEREUNDER.

CONTROLLED BUILDING SYSTEMS, INC.

By:_____

H. Patrick Culp

PERSONAL GUARANTY

BY:_____

Thomas N. Causey
By H. Patrick Culp,
His Agent and Attorney-in-Fact

Paraphed to identify with Agreement dated 10/25/79.

Minos Armentor, Notary Public

PLAINTIFF'S EXHIBIT 4

NEGOTIABLE PAPER

$40,000.00 Opelousas, Louisiana
October 25th, 1979

For value received, I promise to pay to GRONER APARTMENTS the principal sum of FORTY THOUSAND AND NO/100 ($40,000.00) DOLLARS payable, as follows:

> Upon delivery to Maker of evidence satisfactory to Maker (1) that all liens filed against the properties hereinafter mentioned have been satisfied and cancelled; (2) that any and all other such potential lienholders have been paid and have waived their lien rights; (3) that James L. Firmin, AIA, of Morgan City, Louisiana, has certified to the performance and accomplishment of the matters discussed in the last paragraph hereof,

such principal being payable in lawful money of the United States of America which shall be legal tender in payment, at the office of Minos H. Armentor, Esq., New Iberia, Louisiana, or at such other place, either within or without the State of Louisiana, as the holder or holders hereof may from time to time designate.

The makers, endorsers, guarantors and sureties of this note hereby severally waive presentation for payment, demand, notice of non-payment and protest, all pleas of division and discussion. If this note is placed in the hands of an Attorney for judicial collection, or if suit is filed on this note, they further agree to pay all Attorney's fees incurred in the judicial collection of this note, which fees are hereby fixed at fifteen (15%) per cent of the principal then

owing on said note, or sued for, or claimed to be owing to the holder or holders of this note.

ANYTHING HEREIN CONTAINED TO THE CONTRARY NOTWITHSTANDING, IT IS SPECIFICALLY UNDERSTOOD AND AGREED THAT MAKER SHALL BE UNDER NO OBLIGATION HEREUNDER UNLESS AND UNTIL ALL WORK (PRIMARY OR REMEDIAL) TO BE PERFORMED OR ACCOMPLISHED IN CONNECTION WITH THE CONSTRUCTION AND COMPLETION OF THE APARTMENT COMPLEX BEING CONSTRUCTED ON THE PROPERTIES DESCRIBED ON ANNEX "A" HEREOF IS COMPLETED IN ACCORDANCE WITH THE SPECIFICATIONS ATTACHED HERETO, AND MADE A PART HEREOF, AS ANNEX "B", FAILING WHICH MAKER, RATHER THAN PAYING THIS NOTE IN ACCORDANCE WITH ITS TENOR TO THE HOLDER OR HOLDERS HEREOF, MAY APPLY THE MONIES OTHERWISE DUE AND OWING HEREUNDER TO THE PERFORMANCE AND ACCOMPLISHMENT OF THE AFOREMENTIONED MATTERS, AND ANY SUCH MONIES SO APPLIED SHALL CONSTITUTE A CREDIT AGAINST MONIES DUE AND OWING HEREUNDER.

CONTROLLED BUILDING SYSTEMS, INC.

By:_____

H. Patrick Culp

Paraphed to identify with Agreement dated 10/25/79.

Minos Armentor, Notary Public

APPENDIX "M"

16TH JUDICIAL DISTRICT COURT
DOCKET NO. 48,246
IBERIA PARISH, LOUISIANA

GRONER APARTMENTS

VERSUS

CONTROLLED BUILDING SYSTEMS, INC., ET AL

MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

MAY IT PLEASE THE COURT:

This matter comes before this Court on the following motions:

(A) Motion for Annulment of Judgment, filed by C'est La Place, defendant, and;

(B) Motion for Summary Judgment, filed by Groner Apartments, plaintiff.

The factual circumstances surrounding the motions are as follows: On or about October 25, 1979, Groner Apartments sold to Controlled Building Systems, Inc. (co-defendant of C'est La Place) certain real estate located in Iberia Parish. On or about November 9, 1979, Controlled Building Systems, Inc. resold the property with C'est La Place being a purchaser in the chain of title arising out of Controlled Building Systems, Inc.

On August 26, 1981, Groner Apartments filed suit

for dissolution of its sale to Controlled Building Systems, Inc. for failure of consideration and further asked for all rentals collected on the apartments as well as changing the terms of an authentic act. Named as defendants in this action were Controlled Building Systems, Inc. and C'est La Place.

Service was obtained on both defendants and defendant, C'est La Place, the current owner of the real estate, filed a timely answer, denying the allegations of plaintiff's demand. Defendant, Controlled Building Systems, Inc., is evidently a defunct corporation with its major stockholder being deceased. No answer or other pleadings were filed on this defendant's behalf. On or about October 1, 1981, plaintiff confirmed a Default Judgment against Controlled Building Systems, Inc. and granting other relief.

Plaintiff, Groner Apartments, has now filed a Motion for Summary Judgment asserting that the Default Judgment disposes of all issues in the case and that it should be granted judgment against defendant, C'est La Place, as C'est La Place has no greater rights than its predecessor in title, Controlled Building Systems, Inc.

Defendant, C'est La Place, is in the unenviable position of having joined issue timely but having the plaintiff assert that he is entitled to a Summary Judgment based on a Default Judgment rendered against a co-defendant.

ARGUMENT

In connection with the Motion for Summary Judgment it is the defendant's position that either the Default Judgment rendered against Controlled Building Systems, Inc. has no force and effect against C'est La Place or

alternatively that the Judgment should be set aside.

In *Wright and Miller, Federal Practice & Procedure,* Page 289, Paragraph 2690, a discussion of Default Judgments in Actions Involving Several Defendants points out,

> "As a general rule then, when one of several defendants who is alleged to be jointly liable defaults, judgment should not be entered against him until the matter has been adjudicated with regard to all defendants, or all defendants have defaulted.".

In the leading United States Supreme Court case on the subject, *Frow vs De La Vega,* 82 U.S. 552, 21 L ED 60, (1872), the Court said,

> "If the suit should be decided against the complainant on the merits, the bill will be dismissed as to all the defendants alike—the defaulter as well as the others. If it be decided in the complainant's favor, he will then be entitled to a final decree against all. But a final decree on the merits against the defaulting defendants alone, pending the continuance of the cause, would be incongrous and illegal.".

In the instant case, plaintiff has done exactly what the U.S. Supreme Court indicated would lead to an incongrous result. The plaintiff confirmed a Default Judgment against one of the co-defendants, setting aside a sale and granting a money judgment. Now, armed with this Default Judgment, plaintiff has filed a Motion for Summary Judgment saying that C'est La Place, the co-defendant, has no rights. Certainly this results in an

incongruity. If plaintiff's assertions are correct then C'est La Place is in the absurd position of having timely answered, asserted defenses, but would be unable to go to trial on the merits. As the Supreme Court said in *Frow vs De La Vega* (op cit) case,

> "There might be one decree of the Court sustaining the charge of joint fraud committed by the defendants, and another decree disaffirming the said charge, declaring it to be entirely unfounded and dismissing the complainant's bill. And such an incongruity, it seems, did actually occur in this case.".

The answer as to how to handle a default judgment against one of several co-defendants is also found in the *Frow* case at page 554 (op cit),

> "The true mode of proceedings where a bill make a joint charge against several defendants and one of them makes default, is simply to enter a default and a formal decree pro confesso against him, and proceed with the cause upon the answers of the other defendants. The defaulting defendant has merely lost his standing in court. He will not be entitled to service of notices in this cause, nor to appear in it in any way. He can adduce no evidence; he cannot be heard at the final hearing."

In a review of the transcript of the Default Judgment it would appear that parol evidence was adduced to vary the terms of an authentic act, evidence was adduced to show that the conditions in the notes were satisfied by a credit when it is C'est La Place's position that the option of a credit was not available to plaintiff and that by his failure to perform as the notes required, the notes are in fact not due. If the notes are not due then how can the sale

be set aside?

Defendant, C'est La Place, would further point out to the Court that in the event that the Default Judgment against Controlled Building Systems, Inc. is upheld and enforced against C'est La Place then C'est La Place will certainly have been denied "due process" as guaranteed by the United States Constitution.

For the reasons set forth, defendant, C'est La Place, urges the Court to deny the Motion for Summary Judgment by either setting aside the Default Judgment or determining that the Default Judgment rendered against Controlled Building Systems, Inc. has no force nor effect as to C'est La Place.

Respectfully submitted,

VOORHIES & LABBE'
(A Professional Law Corporation)
Attorneys for Defendant,
C'est La Place

BY: _____
JOHN W. HUTCHISON
P.O. Box 3527
Lafayette, LA 70570

CERTIFICATE

I HEREBY CERTIFY that a copy of the above and foregoing Memorandum in Opposition to Motion for Summary Judgment has this date been forwarded to James P. Ryan, Attorney at Law, P.O. Box 897, Opelousas, Louisiana, 70578, attorney for Plaintiff.

Lafayette, Louisiana, this 13 day of January, 1982.

JOHN W. HUTCHISON

APPENDIX "N"

EXCERPT FROM C'EST LA PLACE'S BRIEF TO THE THIRD CIRCUIT COURT OF APPEAL STATE OF LOUISIANA FILED ON FEBRUARY 7, 1983

5. The Trial Court Erred In Denying C'est La Place's Motion For Anullment Of Judgment Rendered Against Its Co-Defendant And Predecessor In Title To The Property, CBS, Because The Default Was Improperly Entered. Also, C'est La Place Received No Notice Of The Default Proceedings And Was Thereby Deprived Of Any Opportunity To Defend Itself and The Property.

On October 1, 1981 Groner confirmed a preliminary default judgment against CBS and obtained a default judgment. C'est La Place received no notice that a preliminary default had been taken or that there would be a confirmation hearing on October 1, 1981. Some six days later, on October 6, 1981, when C'est La Place learned of the default, it filed a Motion for Anullment of Judgment. On January 26, 1982, the trial court denied C'est La Place's Motion for Anullment of Judgment but stated that it was "not conclusive as to C'est La Place, who has timely filed an answer to these proceedings and intends to defend the proceedings." Tr. 195-96. The court went on to say that the mere fact that judgment was confirmed "cannot operate to preclude C'est La Place from setting up any offenses or defenses it may have." *Id.* Judgment was entered accordingly on February 5, 1982. Tr. 204.

Since this was an interlocutory order, C'est La Place

appeals the denial of its Motion for Anullment of Judgment and asks the Court of Appeals to review the decision of the trial court. C'est La Place asserts that the denial of its motion violated C'est La Place's due process rights under the 14th Amendment to the United States Constitution and Louisiana Constitution, Art. 1 §§2 and 4[3] in that the default judgment was taken without any notice to C'est La Place. The judgment entered against CBS, C'est La Place's predecessor in title and co-defendant, and had the effect of depriving C'est La Place of substantial property rights without due process of law.

Groner's suit seeks dissolution of the sale of Groner Apartments to C'est La Place and its return to Groner free and clear of all subsequent alienations. Needless to say, this is a very harsh remedy and should not be granted unless all parties are before the court.

In the early Louisiana Supreme Court case of *McKenzie v. Bacon*, 5 So. 640 (1889), the court held that in an action to rescind the sale for nonpayment of the credit portion, the original purchaser and all vendees under his title "were all treated, and under the law *they must be dealt with as forming together one entity, the title sought to be anulled.*" 5 So. at 642. Since for the purposes of this case all parties embody one entity, the title sought to be anulled, any proceeding affecting the rights of any party in the chain of title must include all of those parties. In the instant case, the default against CBS was taken without notice to Magnus and C'est La Place and should be annulled.

---

[3] Art. 1 §2 states that "no person shall be deprived of life, liberty or property, except by due process of law." Art. 1 §4 provides in relevant part, "every person has the right to acquire, own, control, use, protect and dispose of private property."

It is submitted that Groner purposefully did not give notice to C'est La Place or Magnus of the taking of the preliminary default and the confirmation proceeding against CBS because it wanted to deprive C'est La Place of an opportunity to defend its right to retain the property. It is further submitted that Groner purposefully did not send demand letters (which it sent to CBS) to C'est La Place because it wanted to prevent C'est La Place from exercising its option under the Notes, to deduct the cost of correcting certain items listed in Annex A and B, from the amount of the Notes. It is further submitted that Groner engaged in a plan and scheme to deprive C'est La Place of its rights to the property and in the Notes by making a meaningless demand on CBS, which it knew could not and would not respond.

Even the trial court recognized that C'est La Place, who was not a party to the default proceedings, should not be

APPENDIX "O"

EXCERPT FROM C'EST LA PLACE'S PETITION FOR CERTIORARI OR REVIEW TO THE SUPREME COURT

C'est La Place was an indispensable party to the default proceeding and was entitled to notice of the proceeding and an opportunity to defend its title to the property.

> *Assignment of Error No. 4. The Court Of Appeal Erred In Refusing To Recognize That The Dissolution Of The Sale Under The Circumstances Presented Was An Unlawful Taking Of Defendant's Property Without Due Process Of Law.*

C'est La Place asserts that the denial of its motion violated C'est La Place's due process rights under the 14th Amendment to the United States Constitution and Louisiana Constitution, Art. 1 §§2 and 4 in that the default judgment was taken without any notice to C'est La Place. The judgment entered against CBS, C'est La Place's predecessor in title, was a "taking" of C'est La Place's valuable property rights without due process of law.

As the United States Supreme Court noted in the leading case of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 94 L.Ed. 869 (1950) the Due Process Clause at a minimum requires that deprivation of property by adjudication "be preceded by notice and opportunity for hearing appropriate to the nature of the case." The Court stated that "[t]he right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." 339 U.S. at 314, 94 L.Ed. at 873. In

Mullane the Court held that the Due Process Clause required notice by mailing, rather than by publication only, to known beneficiaries of a common fund.

Likewise, Louisiana courts have held that depriving a person of a valuable right without the opportunity to be heard offends the notions of due process guaranteed by Article 1, Section 2 of the Louisiana Constitution. For example, in *National Acceptance Company v. Wallace*, 194 So.2d 194 (La. App. 2d Cir. 1967), *writ denied*, 196 So.2d 534 (La. 1967), the court reversed on due process grounds a judgment by which a mortgage was cancelled, because the pledgee of the mortgage had received no notice and had no knowledge of the cancellation proceedings. In *Saizan v. Saizan*, 311 So.2d 281, 282 (La. App. 1st Cir. 1974), the court set aside a judgment changing custody of a minor for lack of opportunity to the minor's mother to be heard, stating that "[d]ue process of law in its procedural aspect requries a notice and opportunity to be heard in orderly proceedings adapted to the nature of the case, in accord with established rules." In *Charles Tolmas, Inc. v. Police Jury*, 90 So.2d 65 (La. 1956) this Court invalidated an expropriation proceeding insofar as it affected the property rights of a landowner who received no notice of the hearing at which his property was taken. This Court also ruled that the Louisiana Constitution provision that "private property shall not be taken or damaged except for public purposes and after just and adequate compensation is paid" had not been complied with, since the landowner did not receive payment prior to the taking of his property. *Id.* at 69.

In the instant case the default judgment against CBS was rendered without any notice to C'est La Place and constituted an unreasonable and arbitrary "taking" of the property. Like the "known" beneficiaries in the *Mullane*

case, C'est La Place could and should have been given notice of the proceedings and an opportunity to be heard. This *Court's* holding in *McKenzie, supra*, and fundamental notions of fairness require notice to the record owner of property that his title is under attack by way of a default proceeding to dissolve a sale in his chain of title. If this Court rules that such notice is *not* required, by simply leaving the Court of Appeal's judgment undisturbed, it will impair the value and marketability of all property which has been the subject of a prior credit sale. While a prior credit sale should put subsequent purchasers on notice of a *risk* that a prior vendor may someday seek to dissolve his sale for non-payment, a subsequent purchaser should not be subjected to the greater risk of *actually* losing his rights without any notice whatsoever.

The only "hearing appropriate to the nature of the case," to use the Supreme Court's words, where dissolution of a sale is sought is a hearing at which *all* subsequent purchasers have an opportunity to defend the title.

Assignment of Error No. 5. The Court of Appeal Erred In Refusing To Grant C'est La Place Additional Time To Pay The Credit Portion Of The Price (Assuming That The Price Was Due).

The Court of Appeal ignored the question whether C'est La Place should be allowed additional time to pay the Notes, if they were due. The court is authorized to grant to the buyer additional time, not exceeding six months, in which to pay the credit portion of the sale. La. Civil Code art. 2562. The court below refused to consider or even to discuss this question.

C'est La Place asserts that the circumstances of this

case clearly warranted granting C'est La Place additional time, if the Notes are due, in which to pay them. The circumstances are:

1. Groner never made a formal demand for payment on C'est La Place.

2. Groner never made any demand, formal or otherwise, for payment on C'est La Place pursuant to the provisions of the Notes.

3. On approximately August 24, 1982, the first time C'est La Place was shown the June and July, 1981 "demand" letters from Groner to CBS, C'est La Place expressed its willingness to pay for repairs to the siding and deduct the amounts it paid from the principal of the Notes.

4. C'est La Place was never presented with a finite repair cost to be deducted from the Notes until it was shown the Guillory bid at the trial. At that time, C'est La Place expressed its willingness to respond.

First, no formal demand was ever made on C'est La Place to pay the Notes. While demand letters were sent to CBS, none were sent to C'est La Place even though Groner knew when he sent the letters that CBS had ceased doing

APPENDIX "P"

SUPREME COURT
STATE OF LOUISIANA

DOCKET NO. 83 C 1449

GRONER APARTMENTS

Plaintiff-Appellee

VS.

CONTROLLED BUILDING SYSTEMS

Defendant

AND

C'EST LA PLACE

Defendant/Appellant

On appeal from the Court of Appeal, Third Circuit
State of Louisiana
Docket No. 83-30

Doucet, Yelverton and Knoll, Judges

SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI

In its supplemental petition C'est La Place submits for this Court's review the very recent United States Supreme Court decision of *Mennonite Board of Missions v.*

Adams, 51 U.S.L.W. 4872 (U.S. June 21, 1983) (a copy of which is attached) which addresses the question of the adequacy of notice which is required by the Due Process Clause of the United States Constitution. In *Mennonite*, the mortgage holder (MBM) of certain property contended that it had not received adequate notice of a pending tax sale of the property nor had it received notice of its opportunity to redeem the property following the tax sale. The Indiana law in question provided that the owner of the property was entitled to notice of a pending tax sale by certified mail but a mortgage holder or other interested party was only entitled to notice by publication three times in the newspaper and by posting notice of the pending sale in the county courthouse. The U.S. Supreme Court held that the manner of notice to the mortgage holder did not meet the requirements of due process.

The Supreme Court in *Mennonite* adopted a much more stringent requirement of notice than it had established in prior cases. *Id.* at 4875 (dissenting opinion). Although the majority professes reliance on its earlier decision in *Mullane v. Central Hanover Bank Trust Co.*, 339 U.S. 306, (1950), (cited in C'est La Place's original petition), the dissenting justices point out that the majority in *Mennonite* rejects the balancing test approach of *Mullane* and accepts a *per se* rule against constructive notice.

In *Mennonite*, the majority stated the rule that whenever a party has a legally protected property interest, "[N]otice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable." *Id.* at 4874.

In the instant case, it is undisputed that C'est La Place was *not* given any notice of the default proceedings against its co-defendant and predecessor in title. The Third Circuit Court of Appeal in the instant case held that upon entry of the default judgment, the original sale was dissolved free and clear of the subsequent sale to C'est La Place. Certainly, the default proceeding adversely affected C'est La Place's property rights. Accordingly, the "minimum constitutional precondition" was not met and the default judgment should be annulled herein.

Furthermore, the Court in *Mennonite* stated that a "mortgagee's knowledge of delinquency in the payment of taxes was not equivalent to notice that a tax sale was pending." *Id.* at 4874. Likewise, in the instant case, notice that suit had been filed is not equivalent to notice of the default proceeding. The party affected must have notice of the proceedings which adversely affects his property rights even if the party has notice of a threat to his property rights.

The sole condition for receiving notice under this new Supreme Court approach is that the name and address of the party must be "reasonably ascertainable." In *Mennonite*, however, the only information concerning the mortgage holder on file with the county recorder was "Mennonite Board of Mission, a corporation, of Wayne County, in the State of Ohio." The court assumed that the mortgage holder's address could have been ascertained by reasonably diligent efforts such as mailing a letter to the mortgage holder in Wayne County, Ohio and relying on the "well known skill of postal officials and employees in making proper delivery of letters defectively addressed." *Id.* at 4874, n. 4. Thus, the Supreme Court requires that the party seeking to affect another's property rights must use due diligence in locating that party even when information

about his whereabouts is scant.

The record in the instant case shows that Groner knew the name and address of the registered agent of C'est La Place, Groner had extensive dealings with Magnus, who acted for the partnership, and Groner could have easily given C'est La Place notice of the default proceeding. According to the statement of Groner's counsel, James Ryan, in Groner's appellee's brief to the Court of Appeals, Mr. Ryan was in contact with C'est La Place's attorney shortly after the confirmation of the default:

> "...this writer [Ryan] would point out that the preliminary default was taken against Controlled Building Systems, Inc. on August 1, 1980 (sic) [October 1, 1981], and that date spoke with the attorney for appellant at the time, Ed Taulbee. Mr. Taulbee was informed by appellee's counsel that if he could prove to this counsel how appellee's counsel had violated any ethical or legal or professional standard in taking the default judgment against CBS without notifying Mr. Taulbee first, this writer would consent to have the judgment annulled." (Original brief of Groner to Court of Appeals, p. 40).

Although this excerpt is slightly confusing because Groner's counsel misstates the date of the default judgment and confuses the taking of the preliminary default with the confirmation, the sense of the language is that Ryan contacted C'est La Place after the judgment was confirmed on October 1, 1981[1]. Groner has never disputed the

[1] The record shows that the petition was not filed until August 25, 1981 and the preliminary default taken on September 25, 1981 so Groner could not have contacted Taulbee on August 1, 1980.

fact that C'est La Place was not notified of the default judgment until after it was rendered and that C'est La Place filed a Motion for Annulment of Judgment six days after its rendition. Surely, if Ryan contacted C'est La Place through its counsel on the same day as the default judgment, he could have contacted C'est La Place on that day *before* the judgment was rendered. Accordingly, the condition for receiving notice espoused by the *Mennonite* court was fulfilled in the instant case, yet no notice was given. Since C'est La Place did not receive notice of the default proceeding which adversely affected its right to the property, the Supreme Court decision in *Mennonite* dictates that the default judgment should be set aside.

In the alternative, the decision of this Court in *Kem Search, Inc. v. Sheffield,* No. 82-C-2103 decided on June 29, 1983 supports the suggestion that the case should be remanded to determine whether other grounds exist for the annulment of the default judgment.

In *Kem Search,* this Court, reversing the judgment of the lower court and the Court of Appeal, annulled the default judgment against the defendant, Sheffield. This Court held that a judgment should be annulled for fraud and ill practices when (1) the circumstances under which the judgment was rendered show the deprivation of legal rights of the litigant who seeks relief, and (2) the enforcement of the judgment would be unconscionable and inequitable. This Court stated that Code of Civil Procedure art. 2004 allows annulment where a judgment is rendered through some improper practice or procedure which operates, even innocently, to deprive the party cast in judgment of some legal right, and where the enforcement of the judgment would be unconscionable and inequitable.

In *Kem Search*, this Court stated the precept that:

> "Conduct which prevents an opposing party from having an opportunity to appear or to assert a defense constitutes a deprivation of his legal rights. Thus, when a party fails to defend a suit because of the failure of the opposing party to warn him that a default will be taken, this judgment may be annulled when the parties had an agreement to give notice of any action taken on the suit, or the defaulted party relied on facts which he reasonably believed created such an agreement, and the enforcement of the judgment would be unconscionable and inequitable (citations omitted)." Decision at p. 6.

C'est La Place asserts that applying this holding to the facts of the instant case shows that C'est La Place was unfairly deprived of an opportunity to present its defenses at the default proceedings because it relied on facts which it reasonably believed created an agreement by Groner not to take any action which would prejudice its position and the enforcement of the judgment depriving C'est La Place of its property rights without a hearing was unconscionable and inequitable.

First, given Ryan's (Groner's attorney) statement in the appellee's brief quoted above, one can reasonably conclude that Ryan and C'est La Place's attorney at that time, Ed Taulbee, had some communication regarding the suit prior to the entry of the default judgment on October 1, 1981. Since C'est La Place did not file an answer or make any appearance in the suit prior to October 1, 1981, Ryan would not have known the identity of C'est La Place's attorney unless he had some communication with him previously.

Second, it has come to the undersigned's attention since the decision in *Kem Search*, that Ryan and Taulbee had an agreement, confirmed in writing, granting C'est La Place a 30-day extension of time starting on September 15, 1981 in which to file responsive pleadings. This 30-day extension had not expired when the default judgment against Controlled Building Systems was rendered which adversely affected C'est La Place's rights. Certainly implicit in the attached letters between Ryan and Taulbee is the suggestion that Groner would not do anything to prejudice C'est La Place's rights in the suit during the extension period. Supportive of this inference is the following language in Ryan's letter:

> "I assure you I will not unduly pressure you to file a response. If there is anything I can do to help bring you up to date, do not hesitate to call."

C'est La Place realizes that these letters do not form a part of the record on appeal, but brings them to this Court's attention because they are supportive of C'est La Place's alternative assertion that the case should be remanded to allow C'est La Place to develop additional evidence to determine whether the facts would support an annulment of judgment under the *Kem Search* holding. Although this is the first time this issue has been addressed in this suit, it is proper for the Court to consider it because it did not arise until the Court of Appeal's decision that C'est La Place lost its rights once the default judgment was rendered against its predecessor in title. Moreover, this Court's recent decision in *Kem Search* was published after oral argument in the Court of Appeal.

If C'est La Place's arguments in its petition do not persuade this Court to annul the default judgment, then

C'est La Place, only in the alternative, requests this Court to remand the case to allow C'est La Place the opportunity to show that the facts here fit within the holding in *Kem Search*.

In conclusion, C'est La Place asserts that the recent United States Supreme Court case of *Mennonite* and the Louisiana Supreme Court decision in *Kem Search* support C'est La Place's petition for certiorari. For the reasons set forth herein and in C'est La Place's original petition, C'est La Place respectfully requests the Court to reverse the decision of the lower courts, annul the default judgment against Controlled Building Systems, Inc. and nullify its affect on C'est La Place.

Respectfully submitted,

CHAFFE, McCALL, PHILLIPS,
TOLER & SARPY

BY: _____

Corinne Ann Morrison
Robert S. Rooth
Attorneys for Appellant,
C'est La Place
1500 First N.B.C. Building
New Orleans, Louisiana 70112
Telephone: (504) 568-1320

EXHIBIT

September 15, 1981

Mr. James P. Ryan
Attorney at Law
P.O. Box 897
Opelousas, Louisiana 70570

Re: Groner Apartments vs.
Controlled Building Systems, Inc.
My File: 3268-T

Dear Jim:

This will confirm our conversation of September 14, 1981, at which time you were kind enough to grant me a 30 day extension of time within which to file pleadings above and beyond the normal 14 day extension.

I assure you I will not delay you in this matter.

If for any reason you should feel it necessary for me to file responsive pleadings prior to the termination of the extension, please contact me and I will immediately do so.

With best wishes, I am

Yours very truly,

MARTIN & TAULBEE
A PROFESSIONAL LAW
CORPORATION

BY: _____
EDWARD O. TAULBEE, IV

EOT,IV/mb

A-70

EXHIBIT

MORROW AND MORROW
ATTORNEYS AT LAW
324 W. LANDRY
P.O. BOX 897
OPELOUSAS, LA. 70570

September 15, 1981

Mr. Edward O. Taulbee
Attorney at Law
P. O. Drawer 2908
Lafayette, Louisiana 70502

Re: Groner Apartments v. Controlled Building Systems, Inc., et al.

Dear Ed:

This letter will confirm the 30-day extension granted to you this date. My only hesitancy in granting the extension was due to the fact that my client is a bit anxious and staying on top of day-to-day developments. At any rate, I assure you I will not unduly pressure you to file a response. If there is anything I can do to help bring you up to date, do not hesitate to call.

With kind regards, I am,

Sincerely,

MORROW & MORROW

James P. Ryan

JPR:blb

APPENDIX "Q"

SUPREME COURT
STATE OF LOUISIANA

DOCKET NO. 83 C 1449

GRONER APARTMENTS

Plaintiff/Appellee

VS.

CONTROLLED BUILDING SYSTEMS

Defendant

AND

C'EST LA PLACE

Defendant/Appellant

On appeal from the Court of Appeal, Third Circuit
State of Louisiana
Docket NO. 83-30

Doucet, Yelverton and Knoll, Judges

AMICUS CURIAE BRIEF BY LAWYERS TITLE INSURANCE CORPORATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI OR REVIEW ON BEHALF OF DEFENDANT/APPELLANT, C'EST LA PLACE

LAWYERS TITLE INSURANCE
CORPORATION
JESS NELSON
822 Gravier Street
New Orleans, Louisiana 70112

MAY IT PLEASE THE COURT:

Lawyers Title Insurance Corporation ("Lawyers Title") submits this brief in support of the Petition for Certiorari filed by C'est La Place. Lawyers Title asserts that this Court should grant the Petition for Certiorari in this case because the holding of the Third Circuit Court of Appeal, if left undisturbed, will substantially affect Louisiana property law.

The Third Circuit held that the record title holder of property is not an indispensable party to a default proceeding against the original purchaser in an action for dissolution of the sale. Although the Third Circuit acknowledges that the record owner of the property in the instant case was given no notice of the default proceeding, the court held that upon entry of the default judgment against the original purchaser, a defunct corporation, the original sale was dissolved and the record owner of the property (C'est La Place) lost its title to the property.

Such a decision will adversely affect merchantability of title to real estate in Louisiana because it means that the record owner has no right to notice of a proceeding which deprives him of property rights.

The following issues deserve consideration of this Court: (1) whether the decision in *Sliman v. McBee*, 311 So.2d 248 (La. 1975) should be extended to allow dissolution of a sale under the facts of this case; (2) whether a

record holder of property is an indispensable party to and entitled to notice of a default proceeding in an action for dissolution; and (3) whether the failure to give the record holder notice of the default proceeding and an opportunity to be heard violates his constitutional Due Process rights.

As the court is aware, the *Sliman* case involved the dissolution of a sale between the original seller and purchaser and did not involve the rights of a third party purchaser. Furthermore, in *Sliman* the notes representing the credit portion of the sale were past due *on their face* because payment had not been made on the dates set forth in the notes. The instant case differs from *Sliman* because the rights of a third party purchaser *are* involved and because the note representing the credit portion of the purchase was a conditional one. Furthermore, in the instant case, the parties do not dispute that at least one of the conditions set forth in the notes had not been fulfilled. Lawyers Title asserts that the Supreme Court should at least consider whether the *Sliman* holding should be extended to apply to the facts of this case.

The second important issue presented in this case is whether the record holder of property is an indispensable party to a default proceeding in an action for dissolution. In an early Supreme Court decision, *McKenzie v. Bacon*, 5 So. 640 (1889), this Court held that in an action for dissolution, all owners of the property must be treated as one entity, "the title sought to be annulled." The Third Circuit decision seems to undermine this principle of law by its holding that the record owner is not an indispensable party to a default proceeding in which he loses his rights to the property.

Another important question presented in this case is

whether the failure to notify a third party purchaser of a default proceeding in an action for dissolution violates the Due Process Clause of the United States Constitution. In *Bonner v. B-W Utilities, Inc.*, 452 F.Supp. 1295 (W.D. La. 1978), the federal court held that the present owner of property must be given actual notice of executory proceedings under the Due Process Clause so that he may have an opportunity to defend his property interest. Certainly, the action for dissolution of a sale for non-payment of the credit portion is analogous to an executory proceeding where the debtor has failed to pay the note and mortgage. The rationale of the *Bonner* decision would apply here as well.

Furthermore, in *Mennonite Board of Missions v. Richard C. Adams*, 51 U.S.L.W. 4872 (June 21, 1983), the United States Supreme Court espoused the rule that the Due Process Clause requires that a party with an interest in property must receive notice by mail "or other means as certain to ensure actual notice....to a proceeding which will adversely affect the liberty or property interests of *any* party...." The Third Circuit decision in the instant case holds that no notice is required and contravenes the Supreme Court's current interpretation of the requirements of the Due Process Clause. This Court should determine whether the lack of notice under the instant facts renders the Court of Appeal decision constitutionally infirm.

All of these questions are substantial ones and the Court's ruling on them will have far-reaching effects on Louisiana title law. For these reasons, Lawyers Title respectfully submits that this Court should grant C'est La Place's Petition for Certiorari herein.

Respectfully submitted,

LAWYERS TITLE INSURANCE
CORPORATION

BY: _____
Jess R. Nelson
822 Gravier Street
New Orleans, Louisiana 70112

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Motion For Leave Amicus Curiae Brief, Order and Amicus Curiae Brief has been served upon all counsel of record by mailing same on this _____ day of August, 1983.

_____
Jess R. Nelson

APPENDIX "R"

Constitutional Provisions Involved in This Case

Fifth Amendment, United States Constitution:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Excerpt from the Fourteenth Amendment, United States Constitution:

"Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years

of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The invalidity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in supporting insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation the provisions of this article.

NO. 83-1106

In the Supreme Court of the United States

OCTOBER TERM, 1983

C'EST LA PLACE,

APPELLANT

VS.

GRONER APARTMENTS,

APPELLEE

On Appeal From the Denial of Writ of Certiorari
by the Louisiana Supreme Court

MOTION TO DISMISS APPEAL

MORROW AND MORROW
PATRICK C. MORROW
JAMES P. RYAN
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A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. 83-1106

C'EST LA PLACE,

APPELLANT

VS.

GRONER APARTMENTS,

APPELLEE

On Appeal From the Denial of Writ of Certiorari
by the Louisiana Supreme Court

MOTION TO DISMISS APPEAL

May it Please the Court:

I. OBJECT

The object of this motion is to dismiss appellant's appeal in this case as not being within the jurisdiction of the United States Supreme Court, for the following reasons: The appeal is not taken in conformity to 28 U.S.C. 1257(2). The appeal does not present a substantial federal question. The federal question sought to be reviewed, though

appellee continues to assert he nonexistence of any substantial federal question, were neither timely nor properly raised, nor expressly passed on. The judgment of the state court rests on an adequate nonfederal basis. The grounds for this appeal are fictitious and frivolous and are not supported by facts or the law. Finally, appellees are seeking to have all costs of this appeal, including printing fees for this motion, assessed against defendant-appellant, C'est La Place.

II. FACTS ON WHICH THIS MOTION TO DISMISS IS BASED

Plaintiff-appellee bases this motion to dismiss on the following facts:

1. In its jurisdictional statement, appellant relies solely on 28 U.S.C. 1257(2) as conferring jurisdiction on this Honorable Court. 28 U.S.C. 1257(2) states:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (2) "By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

2. On page 4 of its jurisdictional statement, appellant states or implies that Louisiana Civil Code Articles 2561 et. seq. were "assailed on federal constitution grounds" by

it throughout the state proceedings, "thereby satisfying the first prerequisite to this Court's jurisdiction."

3. The assertion by appellant that it assailed Louisiana Civil Code Articles 2561 et. seq. on federal constitutional grounds is totally false and unsupported by the record. This writer found this assertion by appellant to be so incredulous and misleading, that a request has been made by appellee to the Clerk of the Court of the Sixteenth Judicial District Court, Parish of Iberia, State of Louisiana, to certify and transport certain portions of the record to this Honorable Court.

4. Appellee has requested that the Clerk certify and transport all; pleadings, returns, reasons for judgment, judgments and briefs, filed by or affecting both appellant and appellee in the Louisiana district court proceedings, Louisiana Third Circuit Court of Appeal proceedings, and in proceedings before the Louisiana Supreme Court.

5. The record being certified and transported to this Honorable Court will clearly show that appellant has never questioned the unconstitutionality of Louisiana Civil Code Article 2561 et. seq., or for that matter, any other statute of the State of Louisiana. The assertion by appellant that it has challenged statutes of the State of Louisiana on federal constitutional grounds is a blatant attempt to mislead and convince this Court that it has jurisdiction, when it clearly does not. This writer challenges appellant to cite to this Court any part of the record wherein it challenged the constitutionality of any statute of Louisiana. The record clearly reflects that this was never done.

6. Although the portions of the record being certified and transmitted to this Court will *not* show that appellant

assailed any Louisiana statute on federal constitutional grounds, it will reflect certain facts that will clearly demonstrate appellant's jurisdictional statement is without merit and that this Honorable Court does not have jurisdiction.

7. The record being certified and transmitted to this Court will show that on August 26, 1981, appellee filed suit against two defendants. The two named defendants were Controlled Building Systems, Inc. and appellant, C'est La Place. The object of the suit was to obtain the return of certain immovable property sold by appellee for the failure to receive the purchase price.

8. The record being certified and transmitted to the Court will show that both defendants were properly served with a copy of the lawsuit. The appellant's complaints of "lack of notice" can be viewed in a better perspective when the record reflects it was properly named and served in the lawsuit from the initiation of the lawsuit. What better notice can one have than being included in a lawsuit and *actually* served with the lawsuit?

9. The record being certified and transmitted to the Court will show that appellant's co-defendant, Controlled Building Systems, Inc., did not file any responsive pleadings to the original complaint, despite being properly served with said lawsuit.

10. The record being certified and transmitted to the Court will show appellee entered a preliminary default against appellant's co-defendant and confirmed this default judgment in open court on October 1, 1981. The judgment confirmed on October 1, 1981 was against appellant's co-defendant only and made no mention of

appellant.

11. The record being certified and transmitted to the Court will show that appellant had the right to appeal the judgment taken against its co-defendant on October 1, 1981, but chose not to. Instead, appellant filed a motion to annul the judgment entered against its co-defendant. The argument asserted by appellant in its motion for annullment of the judgment taken against its co-defendant was that "Due Process" required that it be given notice before a default judgment could be properly taken against a co-defendant who was properly served and did not make an appearance. No legal authority was cited by appellant in support of its motion to annul. Instead, appellant argued that the default judgment taken against its co-defendant and predecessor-in-title, would be prejudicial and preclude it from asserting a proper defense to the suit.

12. The record being certified and transmitted to the Court will show that appellee also argued that the judgment entered against appellant's co-defendant would preclude appellant from asserting any defenses to the suit! In fact, after the judgment against appellant's co-defendant became final under state law, appellee moved for summary judgment against appellant, based on the finality of the judgment against its co-defendant and predecessor-in-title.

13. The record being certified and transmitted to the Court will show that the trial court rejected appellee's motion for summary judgment and held that the prior default judgment taken against appellant's co-defendant could not serve to prejudice any right of appellant to assert any defenses to the action brought against it. The trial court also denied appellant's motion to annul the judgment

properly taken against its co-defendant.

14. The record being certified and transmitted to this Court will show that a trial on the merits was held on August 24 and August 25, 1982. During this two day trial, appellant was allowed to assert any and all defenses to the action brought against it, including defenses of its co-defendant.

15. The record being certified and transmitted to this Court will show that on September 29, 1982, the trial court ruled in favor of appellee and against appellant, based on the evidence adduced at the trial held on August 24 and August 25, 1982, and without any regard or reference to the prior default judgment taken against appellant's co-defendant.

16. The record being certified and transmitted to this Court will show that appellant continued to complain of a denial of "Due Process" because it was not notified when a default judgment was taken against its co-defendant, in spite of the following facts:

(a) Appellant was properly named and served with the complaint from the date of initiation of the lawsuit.

(b) The trial judge specifically ruled that the default judgment taken against appellant's co-defendant could not operate to preclude appellant from asserting any defenses.

(c) Appellant was granted a two day trial wherein it was entitled to raise any and all defenses.

(d) The trial court ruled against appellant after

> the trial and without reference to the prior judgment entered against its co-defendant.

This vague and nebulous "Due Process" argument was never even addressed and was thus impliedly rejected by the Louisiana Third Circuit Court of Appeal and the Louisiana Supreme Court. In fact, in its denial of appellant's writ application to the Louisiana Supreme Court, The Chief Justice of the Supreme Court rejected this argument in the following language:

> "Dixon, C.J., concurs in the denial. C'est La Place was a named defendant, was served (then a default judgment was entered and confirmed against CBS), answered and *another trial* was held. *Therefore, the result is correct.*" (Emphasis added)

Appellee has had to pay the sum of $1,378.40 to have this Motion to Dismiss printed. (See Appendix hereto, p. A-1, infra)

II. WHY THIS APPEAL SHOULD BE DISMISSED

The first reason this appeal should be dismissed is that the record does not support appellant's assertion in its jurisdictional statement that this Court has jurisdiction under 28 U.S.C. 1257(2). As discussed in the prior section of this Motion, the record being certified and transmitted to this Court will show that appellant has never assailed any statute of the State of Louisiana on federal constitutional grounds as alleged. Thus, no Louisiana trial court or appellate court has ever passed on the constitutionality of any state statute. The first time appellant has ever questioned the unconstitutionality of any statute of the State of

Louisiana is in the Jurisdictional Statement filed by it before this Court. This Court has consistently held that the failure of an appellant to either timely and properly raise a federal question or to question the validity of a state statute on federal constitutional grounds will entitle an appellee to a dismissal of the appeal. See: *Webb v. Webb*, Ga. 1981, 101 S.Ct. 1889, 451 U.S. 493, 68 L.Ed.2d 392; *Tacon v. State of Arizona*, Ariz. 1973, 93 S.Ct. 998, 410 U.S. 351, 35 L.Ed.2d 346; *Street v. New York*, N.Y. 1969, 895 S.Ct. 1354, 3914 U.S. 576, 22 L.Ed.2d 572; *Cardinale v. Louisiana*, La. 1969, 89 S.Ct. 1162, 394 U.S. 437, 22 L.Ed.2d 398; and *Pickering v. Board of Ed. of Township High School Dist.*, Ill. 1968, 88 S.Ct. 1731, 391 U.S. 563, 20 L.Ed.2d 811.

The second reason that appellant's appeal should be dismissed is because appellant has failed to make a showing that there are substantial federal questions existing in this case as to bring this case into the jurisdiction of this Court for plenary consideration, in violation of Supreme Court Rule 15.1(g). In the section of its Jurisdictional Statement dealing with "Substantiality of the Question Presented", appellant attempts to convince this Court that it has been deprived of property rights without the proper notice and right to a hearing guaranteed under the due process clause of the Fourteenth Amendment. The record being certified and transmitted to the Court will demonstrate that the facts will not support this contention. A careful reading of appellant's jursidictional statement reveals that appellant is not complaining that it did not receive proper notice or a hearing. The reason for this is that appellant was made a party to this litigation at the commencement of this action, was properly served with the petition and was allowed to present any and all defenses in a two day trial held on August 24 and August 25, 1982. Rather,

appellant is actually complaining that it has been denied "Due Process of Law" because a default judgment was properly rendered against a co-defendant without prior notice to appellant. Appellant has not cited any authority in support of this novel proposition that the Due Process Clause of The Fourteenth Amendment to the United States Constitution requires prior notice to a defendant, properly named and served in a lawsuit, before a default judgment can be taken against a co-defendant who is properly served and chooses not to make an appearance. Despite what appellant states in its jurisdictional statement, this is the only federal question ever raised by appellant and addressed by either the trial court or the appellate courts. Appellant has artfully seized upon some dicta in the decision rendered by the Louisiana Third Circuit Court of Appeal decision and quoted it extensively in its Jurisdictional Statement in an attempt to convince this Court that the "holding" of that court is that appellant was not entitled to notice or a hearing of any kind before the property could be adjudicated to plaintiff. However, the record being certified and transmitted to the Court will show that appellant did receive proper notice and a full hearing on the merits. Therefore, the issue of whether appellant was given proper notice and hearing was never presented to the Louisiana Third Circuit Court of Appeal. The only issue before the Louisiana Third Circuit Court of Appeal was whether "Due Process" entitled appellant to prior notice before a default judgment could be entered against a co-defendant who had been properly served and chose not to make an appearance. The Louisiana Third Circuit Court of Appeal ruled that "Due Process" did not require that such notice be given to appellant. Since this was the only issue before the Louisiana Third Circuit Court of Appeal, this was the holding of the court. However, in so holding, the Louisiana Third Circuit Court of Appeal went much further than was

necessary in reaching its decision and implied that appellant need not ever have been named in the original complaint nor served with a copy of the complaint, or be given a hearing of any kind. This language of the decision is clearly dicta since appellant was named in the original complaint, properly served with a copy of said complaint and given an opportunity to present any and all defenses at trial. It is this language of the Louisiana Third Circuit Court of Appeal, which is clearly dicta, that appellant has seized upon and quoted extensively to this Court in its Jurisdictional Statement as being the "holding" of the court, which has deprived appellant of its property without "Due Process of Law". Appellee urges this Honorable Court to reject appellant's efforts to mislead it as to the holding of the Louisiana Third Circuit Court of Appeal in an attempt to establish that this case involves a "substantial federal question". Appellant was properly named in the original complaint, was properly served with a copy of the original complaint and was granted a hearing to present all of its defenses. These facts clearly make this case distinguishable from the cases cited by appellant in support of its argument that this case involves a "Substantial Federal Question". Namely; *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 360 (1950), and *Mennonite Board of Missions v. Adams*, 77 L.Ed.2d 180 (1983). Neither *Mullane* nor *Mennonite* involved a party who was actually named in the original complaint and given *actual notice* by properly being served with said complaint. The record being certified and transmitted to the Court will clearly show that appellant was given *actual notice* by being named in the original complaint and by being properly served with said complaint. The record being certified and transmitted to the Court will *further* show that the only "federal question" ever raised by appellant is that the Due Process Clause of the Fourteenth Amendment requires

that it be given prior notice before a default judgment can be entered against a co-defendant who has been properly served and chooses not to make an appearance. As stated previously, no authority has been cited by appellant in support of this novel proposition and thus appellant has failed in its burden to establish that this case involves a "substantial federal question". Thus, its appeal should be dismissed.

The final and most compelling reason for the dismissal of this appeal is that the judgment of the state court rests on an adequate non-federal basis. This is clear from an examination of the following facts and pleadings:

1. On August 26, 1981, suit was filed by appellee against appellant and a Louisiana Corporation by the name of Controlled Building Systems, Inc. The petition filed sought the return of certain immovable property sold by appellee for the failure to receive the purchase price. Appellee had originally sold the property to Controlled Building Systems, Inc. and appellant was a subsequent purchaser who owned the property at the time of the initiation of the lawsuit.

2. Both Controlled Building Systems, Inc. and appellant were properly served with a copy of the lawsuit. While appellant made a timely response to the petition, Controlled Building Systems, Inc. did not make any appearance.

3. On October 1, 1981, appellee took a default judgment against Controlled Building Systems, Inc. (See Appendix hereto, pp. A-2-3, infra)

4. On October 5, 1981, appellant filed a motion to

annul the default judgment taken against its co-defendant on October 1, 1981. (See Appendix hereto, pp. A-4-8, infra) Appellant complained that the default judgment, taken without notice to it, prejudiced its right to defend the action and assert defenses.

5. After the October 1, 1981 judgment taken against Controlled Building Systems, Inc. had become final, appellee moved for summary judgment against appellee, on the basis that the final judgment against Controlled Building Systems, Inc. was conclusive and binding against appellant, who was merely a subsequent purchaser. (See Appendix hereto, pp. A-9-13, infra)

6. Thus, both appellant and appellee were urging the trial court to hold that the default judgment taken against Controlled Building Systems, Inc. was conclusive as to the rights of appellant. Appellant was urging this in a motion to annul the judgment and appellee was urging this in a motion for summary judgment against appellant.

7. The trial court rejected both arguments on January 22, 1982 and held that the default judgment could not operate to preclude appellant from asserting its defenses to the action. (See Appendix hereto, pp. A-14-15, infra)

8. Thus, the prejudice that appellant complained of and is still complaining of *NEVER, IN FACT, OCCURRED!* The trial court was overprotective of appellant's "Due Process" rights and allowed it to assert any and all defenses it had to the suit in a two-day trial held on August 24 and August 25, 1982.

9. After allowing appellant to assert any and all

defenses to the suit, in the August 24 and 25, 1982 trial, the trial judge found in favor of appellee and against appellant, without any reference to the default judgment previously entered against appellant's co-defendant. (See Appendix hereto, pp. A-16-20, infra)

As stated previously the only federal question ever raised by appellant, in any of the state proceedings is that it was a denial of Due Process of Law under the Fourteenth Amendment of the United States Constitution for the trial court not to have granted its motion to annul the default judgment on the grounds it was entitled to prior notice before the entry of said default judgment. Assuming for the sake of argument that this were true, then it would be a vain and useless act for this court to review this case and hold that the motion to annul the judgment should have been granted by the trial court. The reason for this is that the ruling of the trial court, following the trial held on August 24 and 25, 1982, is a separate and adequate state grounds to support the decision. The fact that the result in this case rests on a separate and adequate state grounds was expressly stated by Chief Justice Dixon of the Louisiana Supreme Court in the denial of appellant's application for writ of certiorari. (See Appendix hereto, A-21-22 infra) In concurring in the denial of the writ, Justice Dixon stated:

> "C'est La Place was a named defendant, was served (then a default judgment was entered and confirmed against CBS), *answered and another trial was held. Therefore, the result is correct.*" (Emphasis added)

This Court has consistently stated that it will not issue advisory opinions and that it will not review a case involving

federal questions when there is an adequate and separate state ground to support the decision. *Zacchini v. Scripps-Howard Broadcasting Company*, Ohio 1977, 97 S.Ct. 2849, 433 U.S. 562, 53 L.Ed.2d 965. The August 24 and 25, 1982 trial and the reasons for judgment rendered thereafter are clearly an "adequate and separate State grounds", which support the result reached, and therefore appellant's appeal should be dismissed.

IV. CONCLUSION

Appellant has sought to bring an unwarranted appeal, and the appeal should be dismissed for lack of jurisdictional requirements, with all costs, including the costs of the printing of this motion to dismiss, being assessed against appellant.

IT IS SO MOVED

Respectfully Submitted,

MORROW AND MORROW
PATRICK C. MORROW
JAMES P. RYAN
Attorney For Appellee
324 West Landry
Opelousas, Louisiana 70571-7090
TELEPHONE: (318) 948-4483

CERTIFICATE OF SERVICE

I hereby certify that all parties who are required to be served with a copy of this Motion to Dismiss Appeal are:

1. C'est La Place
   through its counsel of record
   Ms. Corinne Ann Morrison
   1500 First N.B.C. Building
   New Orleans, Louisiana 70112

2. William J. Guste, Jr.
   Attorney General
   7th Floor, 234 Loyola Building
   New Orleans, Louisiana 70112

I hereby certify that a copy of this Motion to Dismiss Appeal has been served on the above-listed parties by United States mail, postage prepaid.

Opelousas, Louisiana, this 14th day of February, 1984.

PATRICK C. MORROW

APPENDIX "A"

A B LETTER SERVICE
327 Chartres Street
P.O. Box 2409
New Orleans, LA 70176

Morrow & Morrow
324 W. Landry
P.O. Drawer 7090
Opelousas, LA 70570

Typeset, Layout, Print & Collate
Motion to Dismiss in case
C'est La Place vs. Groner Apartments
(6x9 style, 50 Copies)

Typeset and Layout	
39 Pages @ $15.00	$ 585.00
Print & Collate	
39 Pages @ $15.00	585.00
Search Authorities &	
Table of Contents	20.00
Cover, Bind & Trim	40.00
Sub-Total	1,230.00
Tax	98.40
Estimated Shipping	50.00
TOTAL	$1,378.40

APPENDIX "B"

RECORDED IN MORTGAGE BOOK A421 AT FOLIO 533, ENTRY NO. 81-8145

16TH JUDICIAL DISTRICT COURT
DOCKET NO. 48,246
IBERIA PARISH, LOUISIANA

GRONER APARTMENTS

VERSUS

CONTROLLED BUILDING SYSTEMS, INC., ET AL

JUDGMENT

This matter came to be heard on Thursday, October 1, 1981, and, after considering the pleadings and the evidence, the court considering the law and the evidence to be in favor of plaintiff, GRONER APARTMENTS and against defendant, CONTROLLED BUILDING SYSTEMS, INC.:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff, GRONER APARTMENTS, and against defendant, CONTROLLED BUILDING SYSTEMS, INC., dissolving forever the act of sale between the parties dated October 25, 1979, and introduced at trial as Plaintiff's Exhibit 2.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff, GRONER APARTMENTS, and against defendant, CONTROLLED BUILDING SYSTEMS, INC., in the full sum of TWO HUNDRED FOURTEEN THOUSAND

SEVEN HUNDRED TEN AND 19/100 ($214,710.19) DOLLARS, together with legal interest thereon from date of judicial demand until paid and for all costs of these proceedings.

New Iberia, LOUISIANA, this 1st day of October, 1981.

HONORABLE ROBERT E. JOHNSON

MORROW & MORROW
Attorneys for Plaintiff

By: /S/JAMES P. RYAN
JAMES P. RYAN
P.O. Box 897
324 W. Landry
Opelousas, LA 70570

Filed October 2, 1981

APPENDIX "C"

16TH JUDICIAL DISTRICT COURT
DOCKET NUMBER: 48246
PARISH OF IBERIA
STATE OF LOUISIANA

GRONER APARTMENTS

VERSUS

CONTROLLED BUILDING SYSTEMS, INC., ET AL.

MOTION FOR ANNULMENT OF JUDGMENT

On Motion of C'EST LA PLACE, sought to be made defendant herein, and on suggesting to the Court that the judgment rendered in the above entitled and numbered cause is a nullity, and that the same should be annulled by this Honorable Court for the following reasons, to wit:

A.

Your defendant, C'EST LA PLACE, is an indispensable party to these proceedings and must be given notice of and allowed to participate and be heard in all actions taken in these proceedings.

B.

Furthermore, petitioner took a preliminary default against Controlled Building Systems, Inc. on September 25, 1981, and presented evidence at a confirmation hearing on October 1, 1981.

C.

As an indispensable party to this litigation, the rights of C'EST LA PLACE are so interrelated and intertwined with the rights of defendant, CONTROLLED BUILDING SYSTEMS, INC., that defendant, C'EST LA PLACE, has a right to receive notice of all hearings and actions taken herein and the right to be heard at all proceedings on the premises.

D.

By allowing petitioner to proceed against defendant, CONTROLLED BUILDING SYSTEMS, INC., without notice to defendant, C'EST LA PLACE, your defendant, C'EST LA PLACE, has been denied an opportunity to be heard on these issues and to present a defense herein.

E.

That the law of Louisiana, and equitable consideration require that the confirmation proceedings held on October 1, 1981, as against Controlled Building Systems, Inc. and any judgment entered therein be annulled and set aside.

WHEREFORE, premises considered, mover, C'EST LA PLACE, prays that this motion be fixed for hearing on a date and time to be fixed by this Honorable Court and that after all legal delays and due proceedings had, there be judgment rendered in favor of defendant, C'EST LA PLACE, maintaining said motion and declaring any judgment rendered herein in favor of plaintiff and against Controlled Building Systems, Inc. a nullity, and that said judgment be nullified and vacated.

AND FOR ALL GENERAL AND EQUITABLE RELIEF, ETC.

MARTIN & TAULBEE
A PROFESSIONAL LAW CORPORATION

BY: _____
EDWARD O. TAULBEE, IV
Attorney for C'est La Place
P. O. Box 3705
Lafayette, Louisiana 70502
(318) 232-4744

ORDER

IT IS ORDERED that plaintiff in the above entitled and numbered cause show cause on the _____ day of _____, 1981, why any judgment rendered in the above entitled and numbered cause should not be declared a nullity and the same nullified and vacated.

_____, Louisiana, this _____ day of _____, 1981.

_____
DISTRICT JUDGE

CERTIFICATE

I HEREBY CERTIFY that copies of the above and foregoing Motion have been forwarded to all counsel of record by depositing copies of same in the United States Mail, postage pre-paid and properly addressed.

Lafayette, Louisiana, this 5 day of October, 1981.

/S/EDWARD O. TAULBEE, IV
EDWARD O. TAULBEE, IV

16TH JUDICIAL DISTRICT COURT
DOCKET NUMBER: 48246
PARISH OF IBERIA
STATE OF LOUISIANA

GRONER APARTMENTS

VERSUS

CONTROLLED BUILDING SYSTEMS, INC., ET AL.

EXCEPTIONS

NOW INTO COURT, through undersigned counsel, comes C'EST LA PLACE, sought to be made defendant in the above entitled and numbered cause, who, appearing herein solely for the purposes of these exceptions and with full rights being reserved to except and plead hereafter, avers:

1.

Defendant, C'EST LA PLACE, avers that it is an indispensable party to these proceedings and must be notified of and allowed to be heard at any proceedings herein.

2.

Defendant excepts to any proceedings herein which defendant does not have previous notice of or is not allowed to take part and be heard in.

WHEREFORE, premises considered, defendant, C'EST LA PLACE, prays that these exceptions be maintained and that after all delays and due proceedings had,

there be judgment rendered herein in favor of defendant, dismissing plaintiff's suit at plaintiff's cost.

AND FOR ALL GENERAL AND EQUITABLE RELIEF, ETC.

MARTIN & TAULBEE
A PROFESSIONAL LAW CORPORATION

BY: /S/EDWARD O. TAULBEE, IV
EDWARD O. TAULBEE, IV
Attorney for C'est La Place
P.O. Box 3705
Lafayette, Louisiana 70502
(318) 232-4744

CERTIFICATE

I HEREBY CERTIFY that copies of the above and foregoing Exceptions have been forwarded to all counsel of record by depositing copies of same in the United States Mail, postage prepaid and properly addressed.

Lafayette, Louisiana, this 5 day of October, 1981.

/S/EDWARD O. TAULBEE, IV
EDWARD O. TAULBEE, IV

APPENDIX "D"

16TH JUDICIAL DISTRICT COURT
DOCKET NO. 48,246
IBERIA PARISH, LOUISIANA

GRONER APARTMENTS

VERSUS

CONTROLLED BUILDING SYSTEMS, INC., ET AL

MOTION FOR SUMMARY JUDGMENT

NOW INTO COURT, through undersigned counsel, comes the plaintiff, GRONER APARTMENTS, and moves this Court for summary judgment in its favor and against the defendant, C'EST LA PLACE, declaring the rights of C'EST LA PLACE to be identical to the rights of its vendor-in-title and co-defendant, CONTROLLED BUILDING SYSTEMS, INC., and recognizing plaintiff as the owner of the property and rents generated by the property sold by plaintiff to CONTROLLED BUILDING SYSTEMS, INC. on October 25, 1979, and subsequently purchased by C'EST LA PLACE on December 12, 1980. There is no genuine issue of material fact and plaintiff herein is entitled to judgment as a matter of law, for the following reasons, to-wit:

1.

On October 25, 1979, plaintiff sold to the defendant CONTROLLED BUILDING SYSTEMS, INC. an apartment complex located in Iberia Parish, Louisiana. In payment for the purchase of this property, CONTROLLED

BUILDING SYSTEMS, INC. executed two promissory notes in the amount of ONE HUNDRED EIGHTY-FIVE THOUSAND AND NO/100 ($185,000.00) DOLLARS. The October 25, 1979 Act of Sale was recorded in the conveyance records of Iberia Parish, Louisiana, on November 7, 1979, and said recordation contains a recital indicating the sale to be a credit transaction. A certified copy of the Act of Sale dated October 25, 1979, has already been filed into the record of this matter.

2.

On November 9, 1979, defendant CONTROLLED BUILDING SYSTEMS, INC. sold the property acquired from plaintiff on October 25, 1979, to one Alexander Magnus. A certified copy of this Act of Sale has also previously been filed into the record.

3.

On December 12, 1980, Alexander Magnus sold the property acquired by him on November 9, 1979, to defendant C'EST LA PLACE. A certified copy of this Act of Sale is attached hereto as Exhibit A.

4.

On August 26, 1980, plaintiff herein filed suit against defendants, CONTROLLED BUILDING SYSTEMS, INC. and C'EST LA PLACE, seeking a dissolution of the October 25, 1979 sale to CONTROLLED BUILDING SYSTEMS, INC. and a return of the property and rents free of all subsequent alienations and encumbrances.

5.

Personal service was made upon defendant, CONTROLLED BUILDING SYSTEMS, INC. on August 31, 1981, through its registered agent for service of process. A certified copy of the Articles of Incorporation of CONTROLLED BUILDING SYSTEMS, INC., has previously been filed into the record of this matter. No answer was filed by CONTROLLED BUILDING SYSTEMS, INC., and on September 23, 1981, a preliminary default was entered at the request of plaintiff against said defendant.

6.

On October 1, 1981, the preliminary default against CONTROLLED BUILDING SYSTEMS, INC. was confirmed in open court before the Honorable Robert E. Johnson. On finding the law and the evidence to be in favor of plaintiff herein and against CONTROLLED BUILDING SYSTEMS, INC., judgment was granted dissolving the sale of October 25, 1979, between plaintiff and CONTROLLED BUILDING SYSTEMS, INC. The legal delays for appeal having expired, the judgment entered on October 1, 1981, is now a final and binding judgment.

7.

A vendor who is successful in dissolving a sale for the failure of his vendee to pay the purchase price is entitled to a return of the property free of all subsequent alienations and encumbrances. Third party purchasers or mortgagees are placed on notice by the credit sale recorded in the public records and in the event the purchase price is not paid, are relegated to a personal action against their

vendor-in-title. This principle of law is discussed in more detail in the attached memorandum.

8.

Since plaintiff herein has obtained a final judgment against defendant CONTROLLED BUILDING SYSTEMS, INC., dissolving the sale of October 25, 1979, for failure of the said defendant to pay the purchase price, plaintiff is entitled to a return of the property free of all subsequent alienations and encumbrances. Defendant C'EST LA PLACE is a subsequent purchaser of the property made subject of this litigation and acquires only the rights of its ancestor-in-title, CONTROLLED BUILDING SYSTEMS, INC.

9.

Since the judgment rendered against CONTROLLED BUILDING SYSTEMS, INC. is now final, all defenses of CONTROLLED BUILDING SYSTEMS, INC. are extinguished. Plaintiff is entitled to a judgment against defendant C'EST LA PLACE since said C'EST LA PLACE is a subsequent purchaser of the subject property from CONTROLLED BUILDING SYSTEMS, INC.

WHEREFORE, plaintiff prays for judgment in its favor and against the defendant C'EST LA PLACE, declaring the rights of C'EST LA PLACE to be no greater than the rights of its vendor-in-title and co-defendant, CONTROLLED BUILDING SYSTEMS, INC., and recognizing plaintiff as the owner of the subject property and rents generated by the said property sold by plaintiff to CONTROLLED BUILDING SYSTEMS, INC. on October 25, 1979, and subsequently purchased by C'EST LA

PLACE on December 12, 1980.

MORROW & MORROW

Attorneys for Plaintiff

BY: _____

JAMES P. RYAN
P.O. Box 897
Opelousas, LA 70570

APPENDIX "E"

16TH JUDICIAL DISTRICT COURT
PARISH OF IBERIA
STATE OF LOUISIANA

GRONER APARTMENTS

vs. NO. 48,246

CONTROLLED BUILDING SYSTEMS, INC. and
C'EST LA PLACE

REASONS FOR JUDGMENT

On August 26, 1981, the plaintiff filed this suit against Controlled Building Systems and C'est la Place, showing that in October of 1979 Groner Apartments sold to the defendant, Controlled Building Systems, Inc., a certain tract of land in Iberia Parish, and alleged that they failed to pay the purchase price, therefore, they wanted to rescind the sale. The plaintiffs then alleged that the defendant, Controlled Building Systems, Inc., had sold the subject property to C'est la Place, a foreign partnership, and that the sale against them was null also.

Controlled Building Systems, Inc. filed no response to these proceedings and a preliminary default was entered against them on September 25, 1981. On October 1, 1981 this judgment of default was confirmed in a nonadversary proceeding.

The plaintiff now moves for a summary judgment and sets up as a bar to any trial by the defendant, C'est la Place, the default judgment, saying that it is convlusive. This is a non sequitor.

While it may be that the judgment of default is conclusive as to Consolidated Building Systems, Inc., it is not conclusive as to C'est la Place, who has timely filed an answer to these proceedings and intends to defend the proceedings. If we follow the rationale set forth by the plaintiff, the mere fact that the judgment was confirmed would preclude C'est la Place from setting up any defense to these proceedings at all. It cannot operate to preclude C'est la Place from setting up any offenses or defenses that it may have. Therefore, there is a question in this Court's mind as to the applicability of a motion for a summary judgment in this case. Since there is a question of the applicability, the motion necessarily must be denied.

The defendant, C'est la Place, has filed a motion for the annullment of the judgment of confirmation and this, too, will be denied.

Let a formal judgment consistent with these views be presented for signature.

Officially in Chambers at New Iberia, this 22nd day of January, 1982.

ROBERT M. FLEMING
DISTRICT JUDGE

APPENDIX "F"

16TH JUDICIAL DISTRICT COURT
PARISH OF IBERIA
STATE OF LOUISIANA

GRONER APARTMENTS

vs. NO. 48,246

CONTROLLED BUILDING SYSTEMS, INC., ET AL

REASONS FOR JUDGMENT

On August 26, 1981, Groner Apartments, a Louisiana partnership composed of David W. Groner, Katherine Nelson Groner and Marilyn Lee Groner, filed this suit against Controlled Building Systems, Inc., a Louisiana Corporation, and C'est La Place, an Illinois partnership, seeking to set aside a sale dated October 25, 1979, whereby Groner Apartments sold to Controlled Building Systems, Inc. a tract of land which was subsequently by mesne conveyances sold to C'est La Place.

The sale by Groner Apartments to Controlled Building Systems, Inc. is dated October 25, 1979, and was made for a consideration of $231,000, of which the vendee paid $46,000 cash and the balance of the credit portion was represented by two promissory notes, one in the amount of $40,000 and the other in the amount of $145,000.

The credit deed was unusual in that it did not contain a mortgage in favor of the vendor for the unpaid balance and, further, it did contain a waiver of the vendor's lien in these words:

> It is specifically understood and agreed that the vendor shall not enjoy, and hereby waives and releases, the vendor's lien or privilege provided for in Article 3249, et seq, of the Revised Civil Code of the State of Louisiana, and otherwise granted by law.

Of great significance is the fact that the vendor did not waive his right to revoke the sale on account of the non payment of the purchase price.

In the case of Sliman vs. McBee, 311 So.2d 248 (S.Ct. 1975), the court emphasized that the right of the seller under Civil Code Article 2561, to dissolve the sale for failure of the buyer to pay the purchase price, is an entirely separate and independent remedy from the right of the seller to sue for any amount due on the purchase price. The Court stated:

> Where the commutative contract is one of sale, the special rules governing the contract of sale must be consulted, in addition to the general principles announced above. Article 2438. The principal obligation of the buyer is to pay the price of sale. Article 2549(1). Upon his failure to do so, the vendor has two remedies available: one for the enforcement, or affirmance, of the contract, and the other for its dissolution. The second right, asserted here by Mrs. Sliman, is an independent, substantive remedy available under Article 2561 of the Civil Code that is in no way dependent upon the existance of the security device such as a mortgage or a privilege, which secures the first remedy of the seller, i.e., the enforcement of the buyer's obligation to pay the price agreed upon in the contract of sale.

The Sliman case has been uniformly followed since 1975, and it is the law today. In the Sliman case the vendor there also waived the vendor's lien and the Supreme Court ultimately revoked the sale and put the vendor in the position she was before the sale was made.

This Court comes to the same conclusion.

The issues in this case, while complex, boil down to the question of whether the two promissory notes issued as credit for the Groner-Controlled Building Systems sale are past due. If they are past due, then the Groners succeed in their revocatory action.

The $40,000 note contains the following language in addition to the usual verbiage found in promissory notes. They say:

> Anything herein contained to the contrary notwithstanding, it is specifically understood and agreed that maker shall be under no obligation hereunder unless and until all work (primary or remedial) to be performed or accomplished in connection with the construction and completion of the apartment complex being constructed on the properties described on Annex "A" hereof is completed in accordance with the specifications attached hereto, and made a part hereof, as Annex "B", failing which maker, rather than paying this note in accordance with its tenor to the holder or holders hereof, may apply the monies otherwise due and owing hereunder to the performance and accomplishment of the aforementioned matters, and any such monies so applied shall constitute a credit against monies due and owing hereunder.

The $145,000 contains a clause which is almost identical to the above quoted one. The documents identified with the note is a certificate of substantial completion executed by James L. Firmin, architect, Landura Corporation of Louisiana, contractor, and David Groner, as owner, and attached to it is a punch list showing the corrective items necessary for the completion of the building. The punch list contains 15 items. Of the 15 items on the punch list everything was completed except Item 1-B, which says, "The exterior hardboard siding is not acceptable in its present condition. Siding should be replaced."

Groner Apartments, as the name indicates, began the construction of an apartment complex on some land in Iberia Parish, and executed a mortgage in favor of the Farmers Home Administration, which mortgage was assumed by Controlled Business Systems. The apartment complex was nearly complete when the aforesaid credit sale was executed. The question of the exterior siding was never successfully completed. Groner Apartments was in financial distress at and after the sale to Controlled Building Systems. It recognized the obligation to correct the siding and in an effort to do so they secured a bid from Leon Guillory Building Contractor, Inc. to complete this work for $46,835. Of that amount $19,870 was to be paid upon completion from mortgage funds on hand, and the remaining amount of $25,965 was to be paid by Controlled Building Systems, Inc. from funds owed Groner Apartments (according to the bid.) The bid also said that, "This amount to be deducted from the total amount owed Groner Apartments by Controlled Building Systems, Inc." Groner Apartments did not have the cash at hand to pay the portion of the siding bill, a fact which was known to the defendants, and Groner Apartments called upon the defendants to deduct that amount from the notes that were due them

and to pay the notes according to their tenor. The defendants failed to do so after much demand was put on them to live up to their obligation. This Court finds that the notes were due according to their terms and upon the defendants' failure to pay the notes the plaintiff properly instituted this revocatory action.

It is the opinion of this Court that the plaintiff should have judgment against Controlled Building Systems, Inc. and C'est La Place, declaring the act of sale of October 25, 1979 to be dissolved, and the property returned to petitioner, free from all subsequent alienations and encumbrances. The plaintiff asks for damages for fruits and profits of the subject property since the sale, but these items were not proved by a preponderance of the evidence.

On June 22, 1982 the defendant, C'est La Place, filed a reconventional demand and for the reasons above stated it must fall.

Let a formal judgment consistent with these views be prepared by the attorneys Morrow and Morrow, representing the plaintiff, and submitted to John W. Hutchinson, attorney for C'est La Place, for approval "as to form", and then submitted to this Court for signature.

Officially in Chambers on this 29th day of September, 1982, at Franklin, St. Mary Parish, Louisiana.

ROBERT M. FLEMING
DISTRICT JUDGE

APPENDIX "G"

THE SUPREME COURT OF THE
STATE OF LOUISIANA

GRONER APARTMENTS

VS NO. 83-C-1449

CONTROLLED BUILDING SYSTEMS
AND C'EST LA PLACE

In Re: C'Est La Place applying for Certiorari or Writ of Review, to the Court of Appeal, Third Circuit, No. 83-30; from the 16th Judicial District Court, Parish of Iberia, No. 48,246

October 7, 1983

Denied.

JLD

WFM

JCW

HTL

DIXON, C.J., concurs in the denial. C'est La Place was a named defendant, was served (then a default judgment was entered and confirmed against CBS), answered and another trial was held. Therefore the result is correct.

CALOGERO & BLANCHE, J.J., would grant the writ.

Supreme Court of Louisiana
October 7, 1983

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Clerk of Court
For the Court